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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1822

ROBERT D. NEFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Gary James Joslin
Attorney for Petitioner
7742 Mountain Estates Drive
Salt Lake City, Utah 84121
(801) 943-2440

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OPINION BELOW

The opinion of the Circuit Court appears in the appendix. The trial judge did not write one.

The opinion displays the following errors:

REGARDING THE FIFTH AMENDMENT CLAIM:

The trial judge clearly refused to allow the accused to present evidence, outside the presence of the jury, to show that his claim was valid. The Circuit Court

expresses the law flawlessly. It is blind to the facts. It was impossible for Mr. Neff to carry the burden of proof on this issue, because the judge would not listen. The record is crystal clear.

REGARDING THE AFFIDAVIT

The Circuit Court refused to apply the statutory tests set forth in Rule 803(10), Federal Rules of Evidence. This case, if left untouched, will destroy all of Rule 803(10) and bring back the condemned practice of "trial by affidavit." The assault on the Sixth Amendment right of confrontation is obvious.

JURISDICTION

The order of the Circuit Court denying a timely Petition for Rehearing was entered on April 16, 1980. This Petition for Certiorari was filed within 30 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

QUESTION No. 1

WHEN A CITIZEN ASSERTS HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, FOR WHICH HE IS CRIMINALLY PROSECUTED, AND HE FORMALLY REQUESTS AN OPPORTUNITY TO PROVE THAT HIS FIFTH AMENDMENT CLAIM WAS VALID, CAN A TRIAL JUDGE REFUSE TO HEAR SUCH EVIDENCE OUTSIDE THE PRESENCE OF THE JURY?

QUESTION No. 2

CAN THE CIRCUIT COURT DISREGARD THE STATUTORY TESTS OF RULE 803(10), FEDERAL RULES OF EVIDENCE, IN ALLOWING AN AFFIDAVIT INTO EVIDENCE IN A CRIMINAL CASE?

QUESTION No. 3

WAS THE ADMISSION OF A COMPUTER-DERIVED AFFIDAVIT A VIOLATION OF THE ACCUSED'S SIXTH AMENDMENT RIGHT TO CONFRONTATION?

STATEMENT OR FACTS

1. FIFTH AMENDMENT ISSUE

Mr. Neff asserted his Fifth Amendment right against self-incrimination on twenty-six lines of his tax returns for 1974 and 1975.

He was criminally prosecuted for that under 26 U.S.C. Sec. 7203.

Mr. Neff filed a Pre-Trial Motion asking the judge to hear evidence about the validity of the claim. The judge refused.

Mr. Neff made a motion at the trial, before the taking of evidence, asking the judge to hear his evidence on that issue. The judge refused.

The judge allowed the prosecutor to comment on the Fifth Amendment right in front of the jury in her

opening remarks. Mr. Neff moved for a mistrial, that was denied.

The judge refused to listen to any evidence from Mr. Neff concerning the validity of his Fifth Amendment claim.

The judge forced the accused to take the stand to defend his use of the right to silence. The only evidence the judge would listen to was evidence presented in the presence of the jury.

Mr. Neff moved for a judgment of acquittal because he was forced to stand trial on a Fifth Amendment claim without the benefit of a determination of the validity of the claim by the judge.

The jury was allowed to deal with the Fifth Amendment issue. They sent out a note during their deliberations asking only about the Fifth Amendment.

No judge, nowhere, at no time has allowed Mr. Neff to present evidence to prove the validity of his claim. It was impossible for Mr. Neff to sustain his burden of proving the validity of his claim.

2. HEARSAY AND CONFRONTATION ISSUE

The I.R.S. prepared an affidavit especially for this criminal trial. It was prepared just in time for trial (four days before).

The affidavit gave testimony from a computer two thousand miles away.

The computer seemed to evaluate the tax returns of Mr. Neff for 1974 and 1975. First, it decided that the Fifth Amendment claim on the returns was not valid. Second, it decided that the tax returns were not in existence. Then, the computer apparently lost the tax returns and couldn't find them. On the affidavit, the computer testified "No Record of Returns Filed." The I.R.S. said it had the tax returns all the time and offered them into evidence at the trial.

The foundation witness was a custodian of the computer, even though he lived and worked two thousand miles away from it. Almost every I.R.S. agent in the country is a custodian of that computer.

The affidavit gave the strongest available testimonial evidence to prove that Mr. Neff filed no tax returns. The affidavit's opinion on this subject was a complex constitutional legal opinion. That opinion necessarily involved an evaluation of the Fifth Amendment right.

No foundation was laid to show that the affidavit was regularly made by a public agency (other than for trial).

No foundation was laid to show that a diligent search had been made for the sought-after tax returns. In fact, there was no foundation to show that any search at all had been made for them. There was no evidence that a search failed to disclose the sought-after tax returns.

No foundation was laid to show that the affidavit was made at or near the time when the tax return was supposed to be filed.

No foundation was laid to show that the testimony of the computer was based on personal knowledge.

No foundation was laid for the acceptance of computer-derived information.

The testimony in the affidavit could not be cross-examined.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **FIFTH AMENDMENT** (privilege against self-incrimination)

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

2. **SIXTH AMENDMENT** (right to confrontation)

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

3. **FIRST AMENDMENT** (freedom of speech and silence)

> "Congress shall make no law . . . abridging the freedom of speech . . ."

4. **RULE 803(10) FEDERAL RULES OF EVIDENCE**

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"Absence of public record or entry.— To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry."

STATEMENT OF THE CASE

POINT ONE

CITIZENS HAVE A RIGHT TO CLAIM THE FIFTH AMENDMENT. THAT RIGHT WAS INTENDED TO PROTECT THE INNOCENT AS WELL AS THE GUILTY. THE FIFTH AMENDMENT RIGHT SHOULD BE ZEALOUSLY GUARDED BY THE COURTS.

"The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation — are to be found in the lessons of history."

(Chief Justice Earl Warren in *Quinn v. United States*, 349 U.S. 155, 161 (1955)).

It is the essential mainstay of the American adversary system. (81 *Am.Jur.2d*, Witnesses, Sec. 31, p.

58; *Miranda v. Arizona*, 384 U.S. 436; 10 ALR 3d 974).

It is founded upon the maxim of the common law "Nemo tenetur seipsum accusare," (no one shall be compelled to accuse himself), which principle was brought by our ancestors as a part of their birthright. (22A *C.J.S.*, Criminal Law, Sec. 649, p. 540).

It serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. (81 *Am.Jur.2d*, Witnesses, Sec. 39, p. 68; *Slochower v. Board*, 350 U.S. 551).

The privilege must be given a broad construction in favor of the right. (*Ullman v. United States*, 350 U.S. 422). It has always been liberally construed in order to give the fullest effect to immunity. (21 *Am. Jur.2d*, Criminal Law, Sec. 352, p. 380; *Hoffman v. United States*, 341 U.S. 479).

The privilege is and should be zealously guarded by the court. (81 *Am.Jur.2d*, Witnesses, Sec. 37, p. 64).

Under the self-incrimination clause of the Fifth Amendment, a person has the right to remain silent without suffering any penalty for such silence; "penalty" in this context means the imposition of *any sanction* which makes the assertion of the Fifth Amendment privilege "costly." (81 *Am.Jur.2d*, Witnesses, Sec. 41, p. 70; *Spevack v. Klein*, 385 U.S. 511).

"The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a 'witness' . . ." *Garner v. United States*, supra, p. 656.

"A section 7203 conviction cannot be based on a valid exercise of the privilege" (*Garner v. United States*, 424 U.S. 648 (1976), at. 662).

"A valid claim of privilege cannot be the basis for a Section 7203 conviction . . ." (*Garner v. United States*, ibid., p. 663).

"The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege . . ." (*Garner v. United States*, ibid., p. 663).

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . Under our system society carries the burden of proving its charges against the accused not out of his own mouth."
Justice Felix Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 54 (1949)

In this case, Mr. Neff was treated as if the Fifth Amendment did not even exist. He was forced to the stand in front of the jury to defend his use of the right. He received no Fifth Amendment protection whatever. The privilege was not given a broad construction is his favor. The privilege was not given the fullest effect to provide him with any immunity. The privilege was not guarded at all by the lower court or the Circuit Court, let alone "zealously." Mr. Neff was designedly penalized for his assertion of the right to be

silent. Not only was his use of the privilege "costly", his use of the privilege was the very reason for his incarceration. He was criminally convicted for asserting a Fifth Amendment right. Worse than proving guilt "out of his own mouth", Mr. Neff was proven guilty out of his own silence. Although the Supreme Court has expressly held that there can be no conviction under 26 U.S.C. 7203 because of a *valid* exercise of the Fifth Amendment privilege, Mr. Neff was convicted without the judge making any fair effort at determining the *validity* of the claim. Mr. Neff was not given any insulation whatever on the basis of his valid and timely claim of the privilege.

POINT TWO

WHEN A CITIZEN MAKES A FIFTH AMENDMENT CLAIM, AND IT IS CHALLENGED, THERE MUST BE A JUST AND FAIR PROCEDURE TO DETERMINE THE VALIDITY OF HIS CLAIM. OTHERWISE, THE CONSTITUTIONAL RIGHT IS MEANINGLESS.

How can any court hold that Mr. Neff's claim of the Fifth Amendment privilege is invalid, if no correct process of determination has been utilized to arrive at that conclusion?

There must be a procedure whereby the judge looks at the issue, hears the evidence concerning it, and then makes a finding regarding it. It is axiomatic that, for a determination to be made, there must be reasonable steps leading up to that determination.

The Circuit Court in our case correctly and carefully explains the process or procedure for arriving at such a determination. The Circuit Court commendably uses "traditional Fifth Amendment analysis" (*Slip Opinion*, p. 5) to describe it:

STEP NO. 1: The court looks to see if the context of the information gathering device inherently violates the Fifth Amendment privilege. (Id.) Here, they say, it does not.

STEP NO. 2: The court looks for reporting schemes directed at a highly selective group inherently suspect of criminal activities. (Id.) Here, they say, there is none.

STEP NO. 3: The court looks for something peculiarly incriminating about the circumstances of the accused that would justify his reliance on the Fifth Amendment. (Id.) To do this, it examines the implications of the questions in the setting in which they are asked. It looks at the questions themselves, their setting, and the peculiarities of the case. (Slip Opinion, p. 6 citing *Hoffman v. United States*, 341 U.S. at 486; *United States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977); *Hashagen v. United States*, 283 F.2d at 350)

STEP NO 4: Applying those "peculiarities of the case" and his "personal perception" of those peculiarities, the judge then determines if the following apply:

A. Is there a substantial hazard of self-incrimin-

ation that is real and appreciable, and not merely imaginary and unsubstantial? (*Slip Opinion*, p. 5)

B. Is there reasonable cause for the accused to apprehend danger from a direct answer to the question posed to him? A possible link or clue in the chain of evidence is all that is necessary.

STEP NO. 5: The judge then "decides", from his examination, whether a threat of self-incrimination exists. If he determines that there is no reasonable threat, we go to the next step.

STEP NO. 6: ". . . it then becomes incumbent 'upon the defendant to show that answers to the questions might criminate him.'" (Slip Opinion, p. 6, citing *United States v. Weisman*, 111F.2d 260, 261 (2d Cir. 1940) and *Garner v. United States*, 424 U.S. at 658; *United States v. Daly*, 481 F.2d at 30; *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 628 (3rd Cir. 1967); *Hashagen v. United States*, 283 F.2d at 350). At this point, it falls upon the accused to come forward with some evidence. It becomes a duty on his part (not a very heavy one) to bear a burden of proving, in some small degree, why he believes the question could be a link or clue in a chain of incriminating disclosure. His burden of proof does not "require him 'to prove guilt to avoid admitting it.'" (Slip Opinion, p. 7). He only has to "set the door ajar", as this quote by Judge Learned Hand in the Circuit Court opinion properly illustrates:

> Obviously a witness may not be compelled to do more than *show* that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for *he must prove* the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

(My emphasis, Slip Opinion, p. 7, quoting from *United States v. Weisman*, 111 F.2d at 262.

The accused must be allowed to "show" something. He must be allowed to "prove" something. Step No. 6 identifies the error that was perpetrated in this case against Mr. Neff.

CIRCUIT COURT IGNORED STEP NO. 6:

In our case, Mr. Neff filed a Pre-Trial Motion expressly requesting the opportunity to show that answers to the questions might incriminate him. The trial judge refused to hear the matter. At the trial, before any evidence was taken, Defense Counsel orally moved the court to hear evidence from the accused regarding the validity of the Fifth Amendment right. The trial judge refused to hear the matter. Before, during, and after the trial, Defense Counsel did everything he reasonably could to get the trial judge to follow STEP NO. 6 of the above procedure. The trial judge refused, time after

time, to listen to the matter. Instead, the judge's implicit attitude was: "say it to the jury." Mr. Neff wanted to come forward to the judge with evidence on the issue. Mr. Neff wanted to "set the door ajar" with testimony. The trial judge blatantly refused to hear it.

The Circuit Court correctly states the law regarding Step No. 6 above, but it completely and blindly misapplies that law to the facts of this case. No judge, either in the trial court or at the Circuit Court, allowed Mr. Neff to make any showing or to bring forward any testimony, outside the presence of the jury, concerning the validity of the Fifth Amendment claim.

There has never been a reported judicial opinion in the history of American law where a citizen, who expressly requested a chance to show evidence of the validity of his Fifth Amendment right, was denied that opportunity.

POINT THREE

THE FACTS ARE INCONTROVERTIBLE. MR. NEFF WAS DENIED ANY OPPORTUNITY WHATSOEVER TO PRESENT EVIDENCE TO THE JUDGE (OUTSIDE THE PRESENCE OF THE JURY) IN ORDER TO PROVE THE VALIDITY OF HIS FIFTH AMENDMENT CLAIM.

The Circuit Court completely ignores the plain fact that Mr. Neff was not given any opportunity to present evidence to the judge (outside the presence of the jury) in order to prove the validity of his Fifth Amendment claim.

At page eight of the Slip Opinion, the Circuit Court glaringly misapplies the facts of this case to the law it so carefully presented in pages five, six and seven previously. The Circuit Court says:

> "In short, the whole circumstance was 'innocuous and thus unprotected absent some positive disclosure by the witness of its hidden dagners . . . .' Hashagen v. United States, supra, 283 F.2d at 350. Neff made no such disclosure. At no point during the trial, including when Neff testified, was the district judge presented with any indicia of potential incrimination . . . . Neff did not show that his response to the tax form questions would have been self-incriminating. He cannot, therefore, prevail on his Fifth Amendment claim."

(Slip Opinion, p. 5) And also at note 5, the Circuit Court says:

> "That Neff never received a pre-trial evidentiary hearing on his Fifth Amendment claim does not mean that he was deprived of the opportunity to establish its validity. It is clear from the record that Neff's attorney attempted to validate the assertion of the privilege by questioning Neff about his reasons for asserting it and his sincerity in doing so. When the district judge instructed Neff's attorney that Neff could disclose as much or as little of the criminal conduct as he wished, the attorney asked Neff no questions about the underlying reason for his fear of incrimination." (Slip Opinion, note 5)

The Circuit Court ignored the fact that the only reason Mr. Neff "made no such disclosure" and did not present any "indicia of potential incrimination" and did not show why his response to the questions would have

been incriminating, was because the lower court judge refused to hear that evidence outside the presence of the jury. The judge's willingness to hear evidence on this Fifth Amendment claim was solely under the condition that Mr. Neff reveal it in front of the jury. Please notice the incredible context of the trial judge's statement, that is so blandly referred to by the Circuit Court at note 5:

> "JOSLIN (IN THE PRESENCE OF THE JURY)
>
> Q. Mr. Neff, are you prepared at this time to confess the crime which was hidden by your exercise of the Fifth Amendment right on your tax return? Are you prepared to do that now?
>
> A. It seems obvious to me, from my training, that a person doesn't have to confess the crime in order to be protected for his claiming the Fifth Amendment.
>
> Q. Then you do not want to reveal to us what that crime was?
>
> A. If it becomes necessary, to avoid being prosecuted for claiming the Fifth Amendment on the 1040, I suppose I will have to.
>
> Q. What about your fear of incrimination under the crime that was hidden?
>
> A. I think I would — It seems to me, from my background, my training, that they would have to — there would have to be some kind of immunity.
>
> JOSLIN At this time, your honor, we are prepared to go forward with a —

SIMPSON (Prosecutor) I would object, your honor, and suggest that this should be taken outside the presence of the jury" (Transcript, pp. 89-90).

Please consider what happened. Defense Counsel was discussing the Fifth Amendment right in the presence of the jury. That is, of course, extremely prejudicial to the Defendant. Why was the Defense Counsel doing this? Because he was forced to do so by the trial judge. How was Defense Counsel forced to do this? Because of compulsion from the trial judge.

The Prosecutor was allowed by the judge to open up the issue of the Fifth Amendment in the presence of the jury. During the Prosecutor's opening remarks to the jury, she said:

> "MS. SIMPSON (IN THE PRESENCE OF THE JURY)
>
> Mr. Neff did not use this information to prepare a tax return. Instead, he filed with the Internal Revenue Service a Form 1040 on which, on many places on the Form, he wrote the words . . . 'object, self-incrimination.'
>
> MR. JOSLIN: Your honor, I move for a mistrial on the grounds of comments by the prosecution as to the use of Fifth Amendment rights.
> THE COURT: Overruled
>
> (Transcript, p. 12, lines 12-20)

The accused was forced upon the stand to defend before the jury the right to be silent. Once allusion has been made in front of the jury, the accused is virtually driven upon the stand, or remains off at the peril

of having inferences drawn against him from his silence (McNight v. United States, 115 F. 972). The improper mention, in the presence of the jury, by the prosecution, of a Fifth Amendment claim by the accused, is prejudicial error in itself (*Johnson v. United States*, 318 U.S. 189; Am.Jur.2d, Criminal Law, Section 356, p. 383).

The trial judge refused to hear evidence from the accused outside the presence of the jury. The last opportunity for the accused to have anyone consider the validity of his Fifth Amendment claim, was to try to persuade the jury. The trial judge had made it crystal clear that he would not hear this evidence out of the presence of the jury. The accused had tried to get the judge to hear it before the trial by filing a "Pre-Trial Motion For Judicial Ruling on the Constitutional Right to Silence" (Circuit Court Excerpt of Record, pp. 3-7). The accused clearly pointed out to the judge at that time that:

PRE-TRIAL MOTION: (OUTSIDE THE PRESENCE OF THE JURY)

> The burden of his proper use of that right [Fifth Amendment Right] appears now to be shifted onto his back. It appears that he [the Defendant] must either (1) prove to the court that his use of the right to silence was, bona fide and sincere or (2) be forced to stand trial for his use of that right and the consequent failure to supply that information.
>
> * * *
>
> Defendant has not been given any judicial review or determination as to the validity of his assertion

> of his Fifth Amendment rights. Such a judicial determination constitutes (1) a legal issue, (2) a question of law and (3) a sensitive constitutional evaluation of the proper scope of the use by a layman of the right to silence against government compulsion. None of these questions or powers can properly be determined or exercised by a jury and this judicial determination must properly be made before trial.
>
> * * *
>
> The only way the Defendant feels he can prove that his use of his Fifth Amendment right was bona fide or sincere, would be to confess the crime which the reporting of the amount of income or deductions on the tax returns concealed. He does not want to confess that crime. He would only do so because of his fear of being forced to face a trial by a jury of his peers, whom he believes would punish him out of sheer prejudice and ignorance of the law . . . .
>
> * * *
>
> . . . the Defendant will fully confess his crime and prove to the Court that he had a sincere belief that the giving of the information as to the amount of his income or deductions might tend to incriminate him."
>
> ***PRE-TRIAL MOTION FOR JUDICIAL RULING ON THE CONSTITUTIONAL RIGHT TO SILENCE***, Excerpt of Record, selected portions, pp. 3-6.

The trial judge denied this motion on the strange grounds that it was untimely (Slip Opinion, p. 3).

At the time of trial, before any evidence was presented to the jury, Defense Counsel again moved for the taking of evidence on this issue (Transcript, p. 9, lines 7-18).

TRIAL MOTION

JOSLIN (OUT OF THE PRESENCE OF THE JURY)

Your Honor, at this time, we would like to bring forward evidence before the court to prove that there is no question whatever that the claim of the Fifth Amendment rights by the Defendant on the tax return were all valid exercises of that privilege and to show the court that it is entirely improper to go forward with the trial at this time without making a judicial ruling as to the validity of those claims. May we be allowed to make such a . . .

THE COURT: No, counsel. Your time for motions has expired, and any motions you wish to make at this time are, indeed, late. This is the time for the trial.

(Transcript, p. 9)

That ruling was final. The judge said "NO, COUNSEL." And he meant exactly what he said. Every attorney knows what the word "NO" means in response to a motion. It means "denied," "overruled," "I won't do it," "the matter is closed," "If you don't like it, take it up on appeal."

The Circuit Court says that the trial judge "repeatedly expressed his conviction that Neff had no valid self-incrimination claim." (Slip Opinion, p. 3) That is false! That statement is garrishly false! That statement is totally unsupportable! The Circuit Court could not possibly, and did not, indicate the slightest facts in the record to support that incredible notion. How possibly could the Circuit Court make such a statement when

the trial judge indicated throughout the trial that he was not going to even hear the matter (outside the presence of the jury). At the very moment when the Defense Counsel was considering having his client confess to the hidden crime in front of the jury (a ridiculous and damnable alternative), and at the very time when the Prosecutor realized that the situation was legally intolerable, the judge again refused to hear the matter outside the hearing of the jury. Consider:

> "JOSLIN (IN THE PRESENCE OF THE JURY)
>
> Q. Mr. Neff, are you prepared at this time to confess the crime which was hidden by your exercise of the Fifth Amendment right on your tax return? Are you prepared to do that now?
>
> A. It seems obvious to me, from my training, that a person doesn't have to confess the crime in order to be protected for his claiming the Fifth Amendment.
>
> Q. Then you do not want to reveal to us what that crime was?
>
> A. If it becomes necessary, to avoid being prosecuted for claiming the Fifth Amendment on the 1040, I suppose I will have to.
>
> Q. What about your fear of incrimination under the crime that was hidden?
>
> A. I think I would — It seems to me, from my background, my training, that they would have to — there would have to be some kind of immunity.
>
> JOSLIN At this time, your honor, we are prepared to go forward with a —

SIMPSON (Prosecutor) I would object, your honor, and suggest that this should be taken outside the presence of the jury.

THE COURT: Do you want to come forward to the side-bar? All right.

MR. JOSLIN: . . . Could we go into Chambers, your honor?

THE COURT: No. We will do it right here.

MR. JOSLIN: Mr. Neff sincerely took the Fifth Amendment.

THE COURT: Oh, I understand all that. Now, tell me what you were about to say.

MR. JOSLIN: He wanted a right to a judicial determination of his sincerity before trial, and he did not receive it. He has now been forced to stand trial before a jury, but he does not want to be convicted. He feels under compulsion, by the powers of this court, he feels compelled to confess so that it will become obvious that his true criminal activities were protected by the Fifth Amendment, whereas, if he asserts that he is an innocent man under our laws, he has no Fifth Amendment right.

* * *

THE COURT: He can say anything he wants to say so far as that is concerned; if he wants to take the stand and give the length and bredth of his testimony and divulge the matters that he thinks criminal, he can do it. He doesn't have to. He can say whatever he wants to testify to. I will let him testify. It's up to him. It's a decision he has to make, a decision that you have to make.

MR. JOSLIN: Is there some other test?

THE COURT: There is no other test, Counsel.

(Transcript, pp. 89-90).

The judge would not go into chambers. If any evidence were to be given, he demanded it be done on the "stand". The judge would not consider any "other test." The Prosecutor realized that the accused was about to make a confession of guilt in front of the jury and suggested to the trial judge that this "should be taken outside the presence of the jury." Defense Counsel made it clear to the judge that the accused was being "forced to stand trial before a jury" on this matter and that the accused "feels compelled to confess" in front of the jury. The situation was constitutionally intolerable.

No reasonable attorney would force his client to confess a crime, hidden by the use of the Fifth Amendment, in front of a jury. Yet, the Circuit Court held this as a fact against the accused. Consider the blindness in the Circuit Court's reasoning:

> It is clear from the record that Neff's attorney attempted to validate the assertion of the privilege by questioning Neff about his reasons for asserting it and his sincerity in doing so. When the district judge instructed Neff's attorney that Neff could disclose as much or as little of the criminal conduct as he wished [Transcript, pp. 89-90], the attorney asked Neff no questions about the underlying reason for his fear of incrimination (Slip Opinion, note 5).

Is it not glaringly obvious why the Defense Counsel did not ask any such further questions about the Fifth Amendment? The answers would have come in the presence of the jury! The jury would then be preju-

dicially justified in convicting the accused for a confessed crime that was not even charged against him. They might say to one another: "This Neff is a bad fellow. He confessed to us another crime. He deserves some punishment for that other crime. Let us convict him in this case!" Yet, the Circuit Court implies that this was Mr. Neff's wonderful opportunity to bring forward evidence to the judge in order to prove the validity of the Fifth Amendment claim.

Compulsory testimony in front of a jury is no opportunity to present evidence to a judge. Mr. Neff was clearly denied the opportunity to present the evidence outside the presence of the jury.

The trial judge never made a decision on the validity of Mr. Neff's Fifth Amendment claim. The Circuit Court's assertion to the contrary is obviously incorrect. (Slip Opinion, p. 8).

Instead, the trial judge delegated that determination to the jury. The trial judge wanted the jury to decide the issue. The trial judge instructed the jury as to how to decide this issue. It was their duty to decide, he said:

> "You must consider, however, whether such claims of the Fifth Amendment privilege were justified by a fear of self-incrimination under laws other than the tax laws.
>
> * * *
>
> If a person chooses to exercise his Fifth Amendment privilege with respect to a particular in-

> quiry, he may raise the objection in the return . . ."

(Transcript, p. 225).

Actually, the Fifth Amendment issue was presented to the jury as a mere portion of an instruction dealing with the element of "wilfulness." (Instruc. 22, Transcript, p. 181, lines 21-22 and pp 223-225). The jury instruction dealing with the Fifth Amendment was only a small part of the general jury instruction dealing with "wilfulness," not with the Fifth Amendment privilege itself. None of the tests for determining the validity of a Fifth Amendment claim were given to the jury. The jury was not given any of the criteria which were later represented by the Circuit Court as necessary to a proper determination of that issue. Instead, the jury was only given those instructions which indicated that a good faith mistaken belief in the law was a defense to the element of wilfulness. The "wilfulness" requirement under 26 U.S.C. 7203 is totally and completely unrelated to the legal validity test of a Fifth Amendment claim. The "wilfulness" issue is factual in nature, and the mistaken belief of the accused is relevant to that. The Fifth Amendment validity issue is a complex constitutional issue, that can only be decided by a judge, not a jury. In reality, therefore, the trial judge didn't even give the jury a fair opportunity to deal with the Fifth Amendment issue.

The trial judge never made a decision on the validity of Mr. Neff's Fifth Amendment claim. Defense Counsel moved for a Judgment of Acquittal under Rule

29 of the Federal Rules of Criminal Procedure on this very ground. He said:

> MR. JOSLIN (OUTSIDE OF THE PRESENCE OF THE JURY)
>
> ". . . another grounds for the motion for Judgment of Acquittal, is that the Defendant should not be forced to stand trial on a criminal charge for having utilized the Fifth Amendment claim when there has not been a judicial legal determination of that issue . . . , and in accordance with Jury Instruction No. 7, it is only within the province of the jury to determine questions of fact, and we assert that the determination of the use of the Fifth Amendment right at the threshold is a question of law, a sensitive question of constitutional law, and cannot be made by the jury without a threshold determination by the court, and so we ask for a Judgment of Acquittal on that ground."
>
> THE COURT: All right. Denied.

(Transcript, pp. 186-187).

It was obvious to the trial judge, to the prosecutor and to the defense counsel, that the trial judge had never decided whether Mr. Neff's claim was valid. Only the Circuit Court seemed blind to this fact. How can the accused make it any more clear to the Supreme Court?

Yet, even if an appeals court should stretch the facts to conclude that the trial judge had made such a decision, without giving the accused a chance to give evidence on that issue, how could it be said that any such decision was just or fair? The critical error in this

case is that the accused was not allowed to give evidence to prove the validity of his claim outside the presence of the jury. No such decision, existent or nonexistent, can be upheld as proper under due process of law. No judge can fairly make a decision that a Fifth Amendment claim is invalid without giving the accused his chance to prove that the questions might evoke incriminating answers.

POINT FOUR

THE DETERMINATION OF THE VALIDITY OF A FIFTH AMENDMENT CLAIM IS A COMPLEX CONSTITUTIONAL LEGAL DETERMINATION THAT CANNOT BE MADE BY THE JURY.

Legal questions are decided by the court (88 *C.J.S.*, Trial, Sec. 203, p. 403; *Dimick v. Schiedt*, 293 U.S. 474; 75 *Am.Jur.2d*, Trial, Section 320, p. 383).

Factual questions are decided by the jury (88 C.J.S., Trial, Sec. 203, Pp. 403-404; 75 *Am.Jur.2d*, Trial, Section 320, p. 383, and Sec. 662, p. 618).

> "It is the province of the court to determine in the first instance under all the cricumstances of the case whether any direct answer to a proposed question has a tendency to criminate the witness."

81 *Am.Jur.2d*, Witnesses, Section 52, p. 85; *Mason v. United States*, 244 U.S. 362; Annota. 120 ALR 1108, 1116).

> "When a question is propounded, it belongs to the court to consider and to decide whether any

direct answer to it can implicate the witness."

(*Quinn v. United States*, 349 U.S. 155, 168 fn. 37 1955)).

With respect to who determines the validity of the claim of self-incrimination, "It is now settled that the issue is for the *judge* to decide" (his emphasis) (, John Henry Wigmore, *Evidence in Trials at Common Law*, Vol. 8, 1961, Sec. 2271, p. 420. Also see *Uniform Rule of Evidence* 8; *Brown v. United States*, 276 U.S. 134 (1928); *Emspak v. United States*, 349 U.S. 190, 198 n. 18 (1955); *Jones on Evidence*, 6th Ed., 1972, Sec. 22:6, p. 20).

> "The Fifth Amendment privilege against self-incrimination presents preliminary questions which are somewhat like those encountered under the secret of state and identity of informers privilege. *The court is required to examine the claim of the witness . . .*" (my underlining)

(*Weinstein's Evidence-United States Rules*, Vol. 1, Par. 104(14)(6)).

> "The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, *the testimony of a 'witness'. . .*" (my underlining) (*Garner v. U.S.*, supra, p. 656).

A judicial ruling or judicial assessment of the Fifth Amendment claim is favored in the law. Justice Harlan suggested in dicta in the case of *Garner v. United States*, 424 U.S. 648, at 664, that there ought to be a "judicial assessment" or "judicial ruling" on a claim of the privilege against self-incrimination. He said:

> ". . . such a procedure would serve the best interests of the government as well as of the taxpayer, cf. Emspak v. United States, 349 U.S. 190, 213-214 (1955)"

(Harlan, J., dissenting, *Garner*, p. 664, also see fn 19).

Harlan's advice is especially important in a case such as ours where the Fifth Amendment claim was asserted visibly well in advance of any legal proceeding. In the *Garner* case itself, no Fifth Amendment right was timely claimed.

> "One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge."

("Questions for the Court," in 75 *Am.Jur.2d*, Trial, Sec. 320, p. 393).

> ". . . the remoteness or reality of the danger of incrimination is to be *decided by the court* in determining the claim of privilege."

(81 *Am.Jur.2d*, Witnesses, Sec. 39, pp. 68-69; also see section 52, p. 85).

A determination of the validity of a Fifth Amendment claim is a complex question involving constitutional rights of the most fundamental nature, and, as in the First Amendment area:

> ". . . involves not really an issue of fact but a constitutional *judgment* of the most sensitive and delicate kind."

(his emphasis) (Harlan, dissenting, *Roth v. United States*, 354 U.S. 476, 497-498 (1956)). The high court has consistently recognized *its duty to apply the applicable rules of law* upon the basis of an independent review of each case. (See *Watts v. Indiana*, 338 U.S. 49, 51; *Norris v. Alabama*, 294 U.S. 587, 590; Brennan and Goldberg in *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1963)).

Although a "precompliance review" holds a favored position in terms of determining the validity of a Fifth Amendment claim ("This method of achieving precompliance review is particularly appropriate where the Fifth Amendment privilege is involved") (*Maness v. Meyers*, 419 U.S. 449, 462 (1975)), we are concerned with an error infinitely worse — *no judicial review at all.*

The majority opinion of the Supreme Court in *Garner v. United States*, 424 U.S. 648 at P. 664 had something very interesting to say about how sure they were that some kind of official review of the validity of the claim would be made before trial. They said:

> "The government advised us at oral argument that a claim of privilege would stimulate ruling by the Service. It is doubtful, therefore, that a claimant would find himself prosecuted with no prior indication that the Servcie considered his claim invalid. The claimant, however, would not have a judicial assessment of his claim."

(*Garner*, supra, n. 19, p. 664).

Mr. Neff found himself prosecuted with no prior indication of a Service ruling on the validity of his claim. Worse than that, even when Mr. Neff requested a judicial assessment, it was denied. The high court clearly suggests that a judicial assessment of the claim is important, even if a claimant has already had an administrative assessment. But in our case, the Defendant was denied both. This blatant deprivation of his right to silence is all the worse when one realizes that Mr. Neff is being sentenced to two years in prison for a speech-related crime of *omission*, not commission. Communists, *advocating* the overthrow of our government— Abortionists, *advertising* their murderous art— and pornographers, demanding prior restraint protection and pre-seizure adversary hearings for the *display* of forcible rape, all seem to be treated with greater judicial consideration.

POINT FIVE

DELEGATING THE DETERMINATION OF THE VALIDITY OF THE FIFTH AMENDMENT CLAIM TO A JURY UNFAIRLY FORCES THE ACCUSED TO DEFEND HIS CONSTITUTIONAL RIGHTS IN FRONT OF THE JURY. A JURY IS NOT COMPETENT TO DETERMINE SUCH AN ISSUE.

Once an allusion has been made in front of the jury concerning the accused's out-of-court use of the Fifth Amendment, the accused is virtually driven upon the stand to defend his constitutional claim, or remain off at the peril of having inferences drawn against him from

his silence (McNight v. United States, 115 F. 972).

Mr. Neff was driven to the stand to defend his use of the Fifth Amendment in this case. It has already been clearly shown how the trial judge refused to hear any evidence from the accused on this issue. The Prosecutor first exposed the Fifth Amendment issue to the jury in her opening remarks to the jury, because of which the Defense Counsel immediately moved for a mistrial (Transcript, p. 12). From that point on, Mr. Neff's only opportunity to defend himself on this issue was, according to the trial judge, to take the stand and say as much as he wanted (Transcript, pp. 89-90). The judge said this at the very time that the prosecution had suggested that such testimony be taken "outside the presence of the jury" (Transcript, p. 89).

In this case, the Circuit Court itself said that the district judge was the person to receive the evidence and make the determination of the validity of the Fifth Amendment claim, not the jury. They said, "a trial judge must examine the implications," "the trial judge decides from this examination . . . ," and "It is for the court to decide whether his silence is justified" (Slip Opinion, pp. 6-7). We have already documented how incredibly inaccurate was the Circuit Court's application of the facts of this case to their own view of the law. The trial judge in this case refused to hear any evidence from the accused on the issue outside the presence of the jury, and the trial judge did not take it upon himself to examine the implications or to arrive at a de-

cision. The trial judge delegated this decision to the jury. That is clear error.

A jury is not qualified to make such a determination. None of them are law trained. There is a great deal of prejudice against anyone asserting a Fifth Amendment privilege, as it strikes jurors as an attempt to hide something.

So fraught with danger is this exposure to the prejudice of a jury that even the improper mention of the use of the Fifth Amendment claim in front of a jury can be considered prejudicial error (*Johnson v. United States*, 318 U.S. 189; 21 *Am.Jur.2d*, Criminal Law, Section 356, p. 383).

To make matters worse, in our case the trial judge did not even instruct the jury on the criteria to be applied in determining the validity of a Fifth Amendment claim. The jury indicated their concern about the Fifth Amendment claim by sending out a note during their deliberations (Transcript, p. 232). Yet, the only instructions they received from the trial judge dealt with "wilfulness' standards, not criteria for determining the validity of a Fifth Amendment claim (Instruction 22, Transcript, p. 232, pp. 223-225, p. 181). Even worse than that, the trial judge, over express objection of Defense Counsel, refused to allow the jury to have a copy of the jury instructions to read during their deliberations (Transcript, pp. 230-231). It had to have been nearly impossible for the jurors to attempt to apply the Fifth Amendment under those cricumstances.

The Prosecution said on appeal that the jury made no determination of the validity of the Fifth Amendment claim (Appellee's Brief, 9th Circuit, pp. 5-7). That is probably true, because it is legally impermissible for the jury to make such a determination. And that being the case, it is clear that the accused was deprived of any opportunity to present evidence of the validity of his Fifth Amendment claim.

POINT SIX

JUSTNESS AND FAIRNESS REQUIRE THAT THE ACCUSED BE HEARD ON AN ISSUE WHERE THE BURDEN OF PROOF IS PLACED UPON HIM. OTHERWISE, IT IS IMPOSSIBLE FOR THE ACCUSED TO SUSTAIN HIS BURDEN OF PROOF.

The Circuit Court held in this case that it was "incumbent upon the defendant to show that answers to the questions might criminate him" (Slip Opinion, p. 6, quoting U.S. v. Weisman and citing four other cases). There was a burden of proof upon the accused to bring evidence before the trial judge. How can an accused sustain such a burden when the trial judge refuses to hear it?

Mr. Neff could not possibly comply with his burden of proving the validity of his claim. The judge wouldn't hear him. Allowing evidence to be heard from the accused "is the means whereby the truth of a matter may be established" (22A *C.J.S.* Criminal Law, Section 530(1)). Absent such an opportunity, it is not possible to fairly establish the truth.

There has never been a time in the history of American law that an accused who claimed a Fifth Amendment right was not allowed to present evidence to the judge to prove the validity of that claim.

It is the very essence of due process of law that an accused have the full opportunity to receive a fair hearing on that which he has the burden of proving (16A *C.J.S.* Constitutional Law, Section 591, p. 659). How can there be a fair hearing, if the trial judge refuses to hear? A refusal to permit the accused to be heard at the proper time is a violation of due process (*Warren v. State*, 164 So. 234).

If the accused had been given the opportunity to present evidence before a judge as to the reason he asserted the Fifth Amendment, he might have testified to the following. This is a deposition filed with the Circuit Court in the Petition for Rehearing, after the trial and after the Circuit Court handed down its opinion. No consideration of this Deposition was made by the Circuit Court as a result of the Petition for Rehearing. The accused has not been given the opportunity to bring any evidence of this before any judge anywhere:

DEPOSITION OF ROBERT D. NEFF BEFORE THE CIRCUIT COURT IN THE PETITION FOR HEARING

Being duly sworn, I, Robert D. Neff, depose and say:

The reason I asserted the 5th Amendment on my tax forms in 1974 and 1975 was because I was earning

money outside of police work. I feared that I might be criminally prosecuted for "moonlighting" or for engaging in some other crime such as conflict of interest. Police officers are strictly regulated, being a special form of public official and civil servant under an oath of office, and they are subject to more criminal responsibility than other non-public officials. I believed that disclosing my income could be evidence to prove that I was earning money from sources that may have been forbidden by law. In addition we were afraid of possible prosecution stemming from: our children being born at home (due to our religious beliefs) with myself in attendance; and my wife, being a resident alien, having never obtained a Social Security number. Significantly, in a taped interview with Internal Revenue Service employees later, threatening statements were made by them, concerning our children being born at home, in an attempt to ascertain the reason for my claiming my right not to be a witness against myself.

I did not disclose this reason in the lower court because, after the judge refused to hear me on the validity of my 5th Amendment right, the only place that I could make such a disclosure was in front of the jury. I did not believe that I should be compelled to explain to the jury the specific reasons why my fears of self-incrimination were real. The jury could have been prejudiced against me and felt that I deserved to be punished for any wrong I may have been engaged in as a policeman, instead of taking into consideration the crime with which I was charged. To have admitted my reason in front of the jury would have disclosed my wrongful conduct, and therefore, have subjected me to prosecution for that wrongful conduct, which was the very threat I was trying to protect against by asserting the 5th Amendment in the first place. As it was, the jury foreman stated after the trial to witnesses that ". . . maybe the punishment would be less for this, than for what the defendant was hiding" and ". . . if the defendant would have put down something, even ten dollars, along

with taking the 5th, he would have been found not guilty".

I was prosecuted criminally for not giving information on a tax form. The information asked for was the amount of my income. I believed that such information was potentially incriminating. I asserted my 5th Amendment right from the beginning, yet not one administrative or judicial officer ever made a determination that my claim was invalid. I even requested a determination by the judge *at the trial,* but the judge said my request was not timely, and he did not, therefore, make a determination of its validity. He did not even ask me why I asserted the 5th Amendment. How can it be untimely to assert a constitutional right if I put it in writing four years ago on the government forms, placed it in letter to the Internal Revenue Service, and brought it before the court in a formal motion before any evidence at all was introduced. As a police officer, I have been trained to be sensitive in providing full 5th Amendment rights to any criminal suspect, even early in the investigation stage. Even the worst form of criminals, I was taught, have the right not to disclose any information when they are brought into custodial interrogation. For example, if I arrested a rapist in the very act of torturing a young girl, and he asserted his 5th Amendment right, I was forbidden to ask any further question until such time as that person would have the opportunity to have his 5th Amendment right *adjudicated!* Yet, in my case, the crime with which I am charged is far less harmful to society. It would seem to me that the right of society to compel information from me in such cases would be far less justified. Further, the nature of the crime I am charged with involves the use of the 5th Amendment right. If I had not used the 5th Amendment right and supplied the information requested, there would be no prosecution. It was the fact that I did not answer the question and, instead, asserted my right under the 5th Amendment, for which I am being prosecuted. Yet, I have been told in essence, that I have no right to the

5th Amendment, no one stopped in their interrogation of me (even in the circumstance of the compelling situation of a trial setting), and I was not given any opportunity for any judicial hearing as to whether my claim was valid. Not even a hearing of two short minutes.

Just because my attorney, Mr. Joslin, slightly touched on this issue at the trial, does not mean that I was given a fair hearing on that issue. When my attorney asked me if I would be willing to talk about the crime that I was hiding from, it must be remembered that I was in the full view of the jury. As a former policeman, I did not believe then, and I do not believe now, that a criminal suspect is obligated to disclose reasons for his assertion of the 5th Amendment in front of a jury. The very notion of such an obligation seems to me to be extremely unfair and would destroy the entire purpose behind the 5th Amendment. Yet, here I was being compelled, by the circumstances of a jury trial, to defend myself in front of the jury as to the reason why I used the 5th Amendment.

If the reason I had for not reporting my income was because that income had in large part come from a contract-killing, or illegal gambling, or engaging in white slavery across state lines, would the court be willing to give some serious consideration to my claim? If, instead of patriotic literature attached to the tax form, I had attached a copy of the Red Chinese Guerilla Assassination Manual, would the constitution be interpreted to protect me to a greater degree? It seems to me that the court views me as an average American, and that the court is not willing to give an average American the opportunity to use the 5th Amendment. Whereas, those who hurt, maim, and steal from and against their fellow man are given that protection. I ask this question: Was the constitution intended to protect vile and wicked men more than it protects lukewarm wrongdoers or the innocent? I think not.

It is not fair for an appeals court to try to make a determination of the validity of my 5th Amendment claim for the first time on appeal. This is especially not fair when I am not given any opportunity to be present, to be heard, or give evidence in front of that court on that matter. I deserve a hearing on the validity of my 5th Amendment claim, even if it is only two minutes long, before a judge or administrative officer under conditions when it is plain that I am being given the opportunity to present facts and evidence on that important specific constitutional issue. I never got that opportunity before I went to trial, nor was I allowed to have that opportunity at the trial, and it is not the least bit fair for the appeals court to act as if I did receive that opportunity while on trial in the lower court. In this respect, it is significant that, even after the trial, I was approached more than once by an officer of the government, who asked if I knew the dangers of a former police officer going to prison, the possible harm that could come, that I had no right to assert the 5th Amendment on my return, and if I perhaps would tell him why I did so, possibly the judge would give a lighter sentence. *Of course, he said, there would be no guarantee the information would not be used against me.*

Dated: March 7, 1980

Signed: Robert Neff

State of Oregon
County of Multnomah

Being first duly sworn, the above-named individual did appear before me, a Notary Public in and for said County and State, and did sign the foregoing instrument in my presence, this 7th day of March, 1980.
My Commission expires: 5/1/83

Valerie Forskirg
Notary

(Petition for Rehearing, pp. 13-15)

POINT SEVEN

THE ACCUSED WAS CHARGED WITH A CRIME REGARDING A REGULATION OF SPEECH. THE FIFTH AMENDMENT CLAIM MADE BY THE ACCUSED SHOULD BE VIEWED WITHIN THE SENSITIVE CONTEXT OF THE FIRST AMENDMENT OF THE CONSTITUTION

Defendant is compelled to speak. Defendant is compelled to disclose aspects of his privacy. 26 U.S.C. Sec. 7203 compels disclosure of information. That is a direct regulation of speech. As a matter of fact, it is a more direct regulation of speech than the prohibition of offensive speech because it pulls out information against the human will, while prohibitory regulation only punishes acts of commission.

> ". . . the liberty to . . . speak includes the corresponding right to be silent . . ." (16 *C.J.S.*, Constitutional Law, Sec. 213(17), p. 1137).

The right to silence is also intimately connected with the Fourth Amendment right of privacy (16 *C.J.S.*, Constitutional Law, Sec. 351, p. 677; *Barsky v. United States*, 167 F.2d 241).

Compelling a man to speak must be justified under the First Amendment. Any attempt to restrict First Amendment liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by a clear and present danger (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624). The substan-

tive evil must be extremely serious and the degree of imminence extremely high (*Bridges v. California*, 314 U.S. 252; *Wood v. Georgia*, 370 U.S. 375).

Requesting information about a person's tax deductions does not begin to arise to the level worthy of such treatment. Nor does the need for the government to know the exact amount of income a person determines that he received. Far more serious evils than the need to know that kind of information have been struck down as impermissible regulations of freedom of speech.

Nevertheless, assuming that the government has some important interest to protect in compelling such information, it is clear that the utilization of the Fifth Amendment right against self-incrimination should be given all the greater bredth and protectiveness in such an area. The evil protected against by Section 7203 is very weak, and, the weaker the evil, the greater the need for a protective application of other applicable constitutional rights.

This is especially the case when the compelled activity touches upon two other major constitutional rights: (1) the right of silence (First Amendment) and (2) the right of privacy (Fourth Amendment).

There has been a fundamental interplay between the right of privacy under the Fourth Amendment and the prohibition against self-incrimination in the Fifth Amendment (Rex Davis, *Federal Searches and Seizures*, 1964, p. 29; *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States; Oklahoma Press v. Walling*, 327 U.S. 186).

The common thread running through each of these precious constitutional rights is the abhorrence of compulsion, except where absolutely necessary. What can be said of the powerful protection of the Fifth Amendment right to silence is butressed and made even more necessary because of the intimate contact with, and threats to, other favored rights.

> "The privilege against self-incrimination protects a witness from being compelled to testify in any type of proceeding as to matters which may, within the realm of reasonable possibility, tend to incriminate him."

(81 *Am.Jur.2d*, Witnesses, Sec. 40, p. 69).

> "The privilege against self-incrimination secured by the Fifth Amendment against federal infringement . . . protects the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence."

(81 *Am.Jur.2d*, Witnesses, Sec. 30, p. 57; *Malloy v. Hogan*, 378 U.S. 1).

The right to silence, the right when to speak, and unfettered choice are the interlocking fabric of the First Amendment, Fourth Amendment and Fifth Amendment. They demand careful consideration in a case such as this.

CRIMINAL STATUTE	FACTS	PRINCIPLES	CONSTITUTIONAL RIGHTS
Demands speech. Compels the giving of information	Requires "a return" "any information" "any records"	Federal regulation of speech is strictly limited by the constitution.	Congress shall make no law respecting freedom of speech. (1st Amend.)
(26 U.S.C. 7203)	This statute is used to criminally punish silence.	The right to silence is an imperative constitutional mandate that must be liberally applied. It was meant to protect the average citizen far more than the obvious criminal.	First Amendment Rights
	Obvious criminals are given 5th Amend. protection, average citizens are not.		No person need speak if it might tend to incriminate him. (5th Amend.)
The information deals extensively with the private activities of the citizen	11 schedules and 20 different forms for information are included in the 1040 form alone, requesting detailed information on names, occupation, marital status, address, income, expenses, business dealings, etc.	The more intrusive and exploratory the request for information, the greater is the loss of privacy and the loss of security in one's person, papers and effects.	Right of the people to be secure in their persons, papers and effect. (4th Amend.)
			Right of Privacy. (9th Amend.)
			Less intrusive alternative
The information must be accurate under threat of criminal punishment	The information demanded must be given under penalty of perjury (felony) carrying heavy punishment.	The greater the penalty for error and the greater the risk of making a mistake, the greater should be the right to silence, and the greater is the need for more protective safeguards.	Fifth Amendment rights
			Vagueness doctrine
			Favored rights doctrine
			Less intrusive alternative

CRIMINAL STATUTE	FACTS	PRINCIPLES	CONSTITUTIONAL RIGHTS
The information involves tax law and tax accounting	Tax returns and tax record keeping involve complex legal questions, complex legal conclusions, & numerous legal forms.	The more complex the required task, the less people who are competent to perform it. The more complex the subject matter, the greater the need for clear standards, and the more extensive should be the procedural opportunities for dealing with differences of opinion short of criminal prosecution, and the more protective should be the tests defining criminal abridgement of the law.	Due process of law requires definite and certain standards, especially in criminal statutes. Due process also requires extensive procedural and substantive safeguards for protected rights. Due process also requires fundamental fairness.
	Tax work is a recognized profession.		
	Tax law is a recognized legal specialty.		Vagueness doctrine
	Tax law requires special training.		Less intrusive alternative
from ordinary citizens	The ordinary citizen is extremely baffled by tax law and tax requirements. In courts of law he is not considered competent to testify as to such legal issues. Most citizens feel compelled to have tax experts handle such matters.	The less the capacity or the ability of ordinary persons to comply with the rule, the less is the justification for criminal penalties for non-compliance, the greater is the threat to protected rights and the greater is the need for definiteness and procedural safeguards.	Vagueness doctrine
			Less intrusive alternative

CRIMINAL STATUTE	FACTS	PRINCIPLES	CONSTITUTIONAL RIGHTS
the governmental purpose is to discourage non-reporting of tax information	This is a "reporting" crime, not a tax "evasion" crime. The evil aimed at is the refusal to disclose information, not the failure to pay taxes.	Where the statute's purpose is a control of speech (compel the giving of information) and where the wrong aimed at has less inherent evil as compared to other types of criminal acts (i.e., murder, rape, stealing, etc.), there is a greater need for protective safeguards and less justification for governmental interference with protected rights or intrusion into the penumbra of protected rights.	1st Amendment rights (Right to Silence) Favored rights doctrine 5th Amendment rights (Self-incrimination) Less intrusive alternative Balancing doctrine Privacy rights (4th Amend.) Reserved Rights (9th Amend.)
the statutory provision is closely tied to a highly developed program and process of civil collection and civil litigation.	The issues raised by the Defendant could have been handled by civil Tax Court litigation and/or well-developed civil collection procedures that were not utilized.	The greater the accessibility of civil resolution of a dispute, the less justifiable is criminal prosecution without resort to said civil resolution, the greater is the terror and threat of coerced compliance, and the greater becomes the threat to protected rights.	Less intrusive alternative Procedural safeguards

POINT EIGHT

EXHIBIT 1-10 WAS COMPLETELY INADMISSIBLE UNDER NUMEROUS TESTS. IT WAS PREJUDICIAL.

The Prosecution offered Exhibit 1.10 into evidence against the accused. It was an affidavit prepared expressly for trial, executed just four days before the trial began. It purported to be a record of the past history of the accused in filing his tax forms. Prominantly written across one of the pages dealing with the two years in issue were the words "NO RECORD OF RETURN FILED." It was the only documentary evidence that testified that the accused had not filed his tax returns for those two years. As such, it was not a factual characterization, but a legal opinion by someone about the form 1040s that were actually filed. To wit, without explaining who or how the opinion was arrived at, the affidavit merely concluded, in essence, that the form 1040s filed were not tax returns, and, therefore, no tax returns were filed. The affidavit was supposed to be computer-derived information extracted by the witness from a computer a thousand miles away from his office which he was supposed to be "a" custodian of. No one explained how the computer program could characterize the accused's Form 1040s as not being tax returns. There was no foundation to show that the Exhibit was part of a regulary-conducted business activity or that it was made at or near the time that the purported acts took place. (Rule 803(6), Federal Rules of Evidence) There was no foundation to present computer-derived information. There was no foundation as

to a diligent search to find the Form 1040s that the computer characterized as non-existent. That would have been a farce, of course, since the I.R.S. had the Form 1040s in their hands. The exhibit was merely a tool to get a legal opinion about the 1040s in front of the jury.

Defense counsel objected to the admissibility of the Exhibit and to any testimony from the witness characterizing its evidentiary content. (Transcript, p. 27) Defense Counsel objected on Sixth Amendment grounds of confrontation (not subject to cross-examination) and on the grounds of hearsay. (Transcript, p. 35)

The Circuit Court held the Exhibit properly admissible under Rule 803(10) F.R.E., without applying the necessary statutory tests.

POINT NINE

THERE IS NO ADEQUATE FOUNDATION TO SUPPORT THE ADMISSIBILITY OF EXHIBIT 1-10 USING RULE 803(10) OF THE FEDERAL RULES OF EVIDENCE.

Here are the statutory tests for Rule 803(10), and the clear result of their proper application in this case:

CHECKLIST

THE EVIDENCE MUST SUPPORT A "YES" ANSWER TO EACH AND EVERY ONE OF

THE FOLLOWING IN ORDER FOR THE DOCUMENT TO BE ADMISSIBLE

1. The record, report, statement, or data compilation must be of the type that is *regularly made* by a public office or agency. ..... yes √ no

2. Evidence must be given to the effect that a *diligent search* was made for the record, report, statement, or data compilation: yes no
   Either: ..... √

   (a) In the form of a certification authorized under Rule 902. ..... √ yes no

   or

   (b) In form of testimony. ..... √ yes no

3. Evidence must be given that the diligent search *failed to disclose* the sought after record, report, statement, or data compilation ..... √ yes no

The Ninth Circuit made no attempt whatever to apply tests numbered (1) and (3), to wit: "regularly made" and "failed to disclose." Quod Vanum Et Inutile Est, Lex Non Requirit. (Co.Litt. 319, the law requires not what is vain and useless) Those tests in the statute cannot be ignored by Circuit Court judges. They were put there for a purpose, and that purpose is being utterly destroyed in this case.

The "regularity" test comes from Rule 803(7), which is based on Rule 803 (6). Applying the correct statutory tests in this case clearly indicates that the document does not measure up:

CHECKLIST

THE EVIDENCE MUST SUPPORT A "YES" ANSWER TO EACH AND EVERY ONE OF THE FOLLOWING IN ORDER FOR THE DOCUMENT TO BE ADMISSIBLE

1. The document must consist of a memorandum, report, record, or data compilation, in any form.	√ yes	..... no
2. It must indicate acts, events, conditions, opinions or diagnoses.	√ yes	..... no
3. It must have been made at or near the time when the act, event or condition occurred.	..... yes	√ no
4. It must be by or from a person with knowledge of the act, event, or condition.	..... yes	√ no
5. It must be a document which is kept in the course of a regularly conducted business activity.	..... yes	√ no
6. It must be the regular practice of that business activity to make that memorandum, report, or record.	..... yes	√ no

7. Each and all of the above requirements must be shown by the testimony of the..... √
custodian or other qualified witness. yes no

Even if all the above requirements are met, the document is not admissible when (a) the source of the information or (b) the method or circumstances of preparation, indicate a *lack of trustworthiness.*

The government laid no foundation to show that the making of Exhibit 1.10 was "kept in the course of a regularly conducted business activity." FRE 803(6). They said nothing at all about this requirement.

The regularity of the activity is one of the essential features that gives the kind of reliability or trustworthiness to a document which allows the hearsay exception at all. The Ninth Circuit had previously said:

> "The memorandum cannot be considered as having been made in the regular course of business unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of the records."

Standard Oil v. Moore, 251 F.2d 188, 215 (9th Cir. 1957)

The duty to show this routine procedure devolves on the appellee.

> "If there was any systematic or routine procedure being followed in the preparation and filing of such writings, the burden was upon appellee to prove it."

Standard Oil, supra, p. 215

The type of "regularity" that should be displayed is of the kind which tends to "counteract the possible temptation to misstatements." *Wigmore*, Section 1522; *Hoffman v. Palmer*, 129 F.2d 976, 977 (headnote 6), *Am.Dig.Sys.*, Evidence, Key No. 354(10).

If the supplier of the information (who is altogether unknown in our case) does not act in the regular course of the business, assurance of accuracy does not extend to the information itself. (Salzburg and Redden, *Federal Rules of Evidence Manual*, 2nd Edition, 1977, p. 544)

FRE 803(6) contains a double requirement regarding the regularity of the activity: (1) the exhibit must be "kept in the course of a regularly conducted business activity," and (2) it must have been part of "the regular practice of that business activity to make that memorandum" or report. That second requirement was an attempt by Congress to make very sure that the necessary degree of trustworthiness is maintained. (*Federal Rules of Evidence Manual*, supra, pp. 557-558). Neither of these critical requirements were established as a foundation at the trial for the admission of this prejudicial exhibit.

POINT TEN

EXHIBIT 1-10 WAS NOT MADE AT OR NEAR THE TIME OF THE EVENT

FRE 803(6) requires that the memorandum or report must have been "made at or near the time" of the acts or events contained therein.

That was not done in our case. The events reported in Exhibit 1.10 occurred in 1972, 1973, 1974, 1975, 1976 (and other times), but were reported in the affidavit on January 25, 1979, many years later.

> ". . . the regular course of business must have been to make such records contemporaneously or within a reasonable time thereafter."

United States v. Scholle, 553 F.2d 1109, 1124 (8th Cir. 1977); *United States v. Anderson*, 447 F.2d 833, 838 (8th Cir. 1971).

THERE WAS NO FOUNDATION LAID TO SHOW THAT THE REPORT WAS MADE BY A PERSON WITH KNOWLEDGE

FRE 803(6) requires that the report be made by "a person with knowledge." That is, there must be some showing that it was the regular course of the business for one with personal knowledge to make such a record. (Also see Model Code Rule 514)

> "A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data complications upon a transmission from a person with knowledge . . ."

> ". . . the scope of the phrase 'person with knowledge' is meant to be coterminous with the custodian of the evidence or other qualified witness."

Saltzburg, *Federal Rules of Evidence Manual*, Report of the Senate Committee on the Judiciary, Rule 803(6), p. 561.

Gary Riddle said that he worked at the Fresno Service Center (Trial Transcript, Vol. 1, p. 19, line 11). There was no clear testimony that Mr. Riddle was custodian of the records of the National Computer Center in Martinsburg, West Virginia, some 2,000 miles away from where he worked. Mr. Riddle's testimony that "I am also custodian of the records" (Transcript, p. 20) after mentioning his duties with respect to research at the Service Center and:

> ". . . return files to the Federal Archives and Record Center, and the National Computer Center in Martinsburg, West Virginia." (Id.)

could not possibly have meant that he was custodian of the records of all those centers. At the very most he was "a", not "the" custodian of records at the Fresno Service Center, and certainly not "the" custodian of the records in Martinsburg, West Virginia.

The information used to prepare Exhibit 1.10 was taken from the records of the National Computer Center in Martinsburg, West Virginia. To wit:

> "Q. Do you know by whom this document was prepared?
>
> A. This is the document that I prepared.
>
> Q. And what information did you use to prepare the document?

> A. I researched the National Computer Center in Martinsburg, West Virginia, where all tax information is merged for every individual in the nation." (Testimony of Gary Riddle, Transcript, p. 27.)

There was no proper foundation laid to show that Exhibit 1.10 was made by a person with knowledge as required by FRE 803(6).

FRE 803(6), it must be remembered, is a great step away from the demanding hearsay exception requirements of the business records exception that was existent at the time of the ratification of the Sixth Amendment. At that time:

> "If the entrant himself lacked personal knowledge, the foundation for the records required the testimony of all those giving information to their personal knowledge or proof of their unavailability."

McCormick, *Evidence*, Sec. 310, p. 725.

If the inadequacy of the foundation of a "person with knowledge" is shaky in the light of the contemporary rule 803(6) itself, consider how indefensible it is in the light of the Sixth Amendment right of confrontation.

"If the witness cannot vouch that the requirements of Rule 803(6) have been met, the entry must be excluded."

Weinstein's Evidence, Sec. 803(6)(2), p. 803-13; *Halperin*, 441 F.2d 612 (5th Cir. 1971).

POINT ELEVEN
NO PROPER FOUNDATION WAS LAID FOR THE ADMISSION OF COMPUTER-DERIVED INFORMATION AS CONTAINED IN EXHIBIT 1.10

The fact that Exhibit 1.10 was prepared from computer storage (See Riddle's testimony, Transcript, p. 27) only makes the strictness of the requirements of laying a proper foundation more demanding.

Aside from the very compelling rule that public reports and computer data compilations are precluded from use against an accused under the Federal Rules of Evidence (*United States v. Ruffin*, 575 F.2d 346, 355-356 (2d. Cir. 1978); *Am.Dig.System*, Criminal Law, Key No. 419(12); also see the very scholarly analysis in *United States v. Oates*, 560 F.2d 45 (2d. Cir. 1977), the use of computer retrieved information requires a more substantial foundation for admissibility than other types of records. (See Note, "Appropriate Foundation Requirements for Admitting Computer Printouts Into Evidence," 1977 *Wash. U.L.Q.* 59; 126 *U.Pa. L.Rev.* 425 (1977); *Monarch Fed'l S. & L. v. Genser*, 156 N.M. Super. 107, 383 A.2d 475 (excellent discussion of the proper foundation for computerized business records).

> ". . . the complex nature of computer storage calls for a more comprehensive foundation (than for ordinary business records) . . . . Assuming properly functioning equipment is used, there must be not only a showing that the requirements of the Business Records Act (presumably Rule

> 803(6) have been satisfied, but in addition the original source of the computer program must be delineated, and the procedures for input control including tests used to assure accuracy and reliability must be presented."

United States v. Scholle, 553 F.2d 1109 (8th Cir. 1977), quoted in *Federal Rules of Evidence Manual*, 1978 Supp., p. 162.

The record is painfully clear that no such proper foundation was laid.

> "Some courts have been too lenient in allowing the admission of computer evidence inadequately supported by corroborating testimony. The facts are that the reliability of computer records is clouded by a large number of nonobvious opportunities for error or misuse."
>
> 126 *U.Pa.L.Rev.* 425, 451 (1977)

POINT TWELVE

THE PURPOSE OF 803(10) WAS TO RECOGNIZE THE ABSENCE OR NON-EXISTENCE OF SOUGHT-FOR DOCUMENTS, NOT TO ALLOW SELF-SERVING OPINIONS ABOUT EXISTENT DOCUMENTS

The damaging and prejudicial impact of Exhibit 1.10 is found most clearly in the five times repeated opinion:

"NO RECORD OF RETURN FILED." This is the portion of Exhibit 1.10 for which the government cites FRE 803(10).

FRE 803(10) cannot be used as a technique of intentional blindness to records or documents known by the government to exist. If *any form* of the sought-after document is know to exist, the government cannot use a rule 803(10) certificate to say no such form was found.

The clear wording of FRE 803(10) makes it obvious that the sought-after document or record (e.g., a tax return for a given year) must be absent and non-existent "*in any form*" in order for the public agency to use rule 803(10). The words "*in any form*" are repeated two times in the body of the rule itself. The reason is obvious. The persons who wrote the rule did not want some agency saying that no such document existed because they *characterized* the documents they did find in such a way as to *define them out of existence*. A crude example of my own will suffice: (hypothetical example)

> Department of Transportation has a regulation requiring truckers to file "log sheets" with the agency annually. The DOT regs. say if the date is not typed on the upper right hand corner of each such sheet, then it is not deemed to constitute a lawful "log sheet." Standard forms are supplied by the agency bearing the name "log sheets." Trucker Brown, using the agency standard forms, places information on them, omits the typed date in the corner and files the "log sheets" with the agency. Later, the trucker is subject to litigation for his alleged failure to file. The agency tries to use 803(10) to assert that it serached its files and just could not find any "log sheets" for the years in question, because

of the way they legally interpret the character of the sheets they absolutely know he filed.

This kind of semantical chicanery is expressly forbidden by the words "*in any form.*" It is obvious to the reasonable mind that any document that somewhat resembles the sought-for record, and particularly a document *on the standard agency form* used for that purpose, in spite of its questionable form, constitutes a form of the document sought. If this were not so, any public agency could merely define away the existence of any unacceptable document.

The Defendant undeniably filed with the Internal Revenue Service the standard form 1040, U.S. Individual Income Tax Return, for the taxable years 1974 and 1975 charged in the indictment. They bore his name, his signature and other answers to questions thereon. The Internal Revenue Service knew he had filed these documents. Gary Riddle, the witness used to offer them into evidence, knew of their existence (although Exhibit 1.10, which he said he prepared, said "NO RECORD OF RETURN FILED") (See Exhibit 1.6 — Neff 1040 form for 1974 — and Exhibit 1.9 — Neff 1040 form for 1975 —, offered into evidence through witness Riddle, Transcript, Vol. 1, pp. 22 and 25).

The only purpose, therefore, of the five-times repeated opinion on Exhibit 1.10 was to attempt to influence the jury to believe that the legal opinion of the character of the tax returns filed by the Defendant given by the Service was correct. The I.R.S. wanted to

make the question of fact very simple for the jury by giving them an evaluative report that concluded in five simple words "NO RECORD OF RETURN FILED." The entire last page of Exhibit 1.10 was a legal maneuver to color the jury's view of documents (1040 forms) *known to exist — known not to be absent* in any manner from the Service records.

Exhibit 1.10 (especially the last page) is nothing less than the old-fashioned technique of TRIAL BY AFFIDAVIT, condemned by our system of law for decades. (*Mattox v. United States*, 156 U.S. 237, 242-243 (1895); *Douglass v. Alabama*, 380 U.S. 415, 418-419 (1965); *Barber v. Page*, 390 U.S. 719, 721 (1968); *Am.Dig.Sys.*, Criminal Law, Key No. 662 (1, 3).

POINT THIRTEEN

THERE WAS NO FOUNDATION TO SHOW THAT A *DILIGENT SEARCH* WAS MADE WHICH FAILED TO DISCLOSE THE SOUGHT-AFTER TAX RETURNS

FRE 803(10) requires that a foundation be laid in certificate or testimonial form to show that "diligent search failed to disclose" the sought-after document.

Simply stated, there was no such foundation laid. The certificate on page three of Exhibit 1.10 did not say that. Gary Riddle did not testify to that. There was no foundation.

Of course, it would have been a solemn mockery to have attempted such a foundation since the witness

was being used to offer into evidence the very documents he would have to say he could not find after a "diligent search."

There must be a declaration clearly setting forth the fact that "after diligent search no record or entry of a specified tenor was found in the records designated by the statement." *Weinstein's Evidence* 803-2.

The record makes it obvious that there was no testimony nor certification that a search had been made for "1040 forms" or the like for the years in question.

The Circuit Court opinion, that a "Mere failure to include the word 'diligent' is not sufficient to defeat the applicability of Rule 803(10)," is pure subterfuge. The record is clear that no search whatsoever was made for those particular Form 1040s. "No search" is a far cry from a "diligent search." Surely the statutory rule of "diligent search" cannot be twisted so far out of shape that the courts will allow a Rule 803(10) admission when there is no search at all for the sought after documents! No one ever said that a search had been made for Neff's tax returns. That is the very least that must be said to support a Rule 803 (10) hearsay exception! It must be said in testimony or in a certificate, and it was not.

POINT FOURTEEN

EXHIBITS PURPORTING TO BE FACTUAL REPORTS THAT ARE PREPARED FROM INVESTIGATIONS LEADING TO CRIMIN-

AL TRIALS CANNOT BE ADMISSIBLE AGAINST AN ACCUSED.

The case of *United States v. Oates* (560 F.2d 45 (2d Cir. 1977) is the most carefully reasoned and carefully presented discussion of this issue existent. It warrants particular consideration by the Supreme Court.

> "We thus think it manifest that it was the clear intention of Congress to make evaluative . . . reports absolutely inadmissible against defendants in criminal cases." (Page 72)
>
> * * *
>
> . . . under FRE 803(6) or any other exception to the hearsay rule." (Page 77)
>
> * * *
>
> . . . in criminal cases reports of public agencies . . . setting forth factual findings resulting from investigations . . . cannot satisfy the standards of any hearsay exception if those reports are sought to be introduced against the accused." (Page 84)
>
> * * *
>
> ". . . when there is a tension between the confrontation clause of the Sixth Amendment . . . and the literal language of the various hearsay exceptions it was the congressional intent that a less literal reading of the rules would be justified." (Page 79)

United States v. Oates, 560 F.2d 45, 79 (2d. Cir. 1977) (2d Cir. 1977). The *Oates* case carefully discusses the background and legislative purpose of Rule 803, as well as the Sixth Amendment context of that

rule. It is the most scholarly and wise judicial opinion extant on this issue. The Circuit Court in our case woefully misconstrued the *Oates* case in its handling of this issue.

> ". . . the rule with respect to evaluative reports . . . is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case."

Moore's Federal Practice, Vol. 11, Sec. 803 (8) (7), p. VIII-151 (1976); also see *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); *Lomax Transportation Co. v. United States*, 183 F.2d 331 (9th Cir. 1950); *Yung Jin Teung v. Dulles*, 229 F.2d 244 (2d Cir. 1956); Annotation, 69 *ALR2d* 1148.

Exhibit 1.10 in our case has great similarity to the IRS worksheets not admissible in the case of *Hartzog v. United States*, which were also made in preparation for that prosecution. Those worksheets were "the product of his [an IRS agent's] judgment and discretion and not a product of any efficient clerical system"

> "There was no opportunity for anyone . . . to tell when an error or misstatement had been made."

They were

> ". . . no more than (an) unsworn, unchecked version of what he thought (the) records contained."

217 F.2d 706, 710 (4th Cir. 1954). The necessary "earmarks of reliability" were clearly lacking. Id., p. 710; *Palmer v. Hoffman*, 318 U.S. 109, 113-114.

> "The 'regular course of business' exception to the hearsay rule does not cover a regular practice of making records with the purpose of supplying evidence in a highly probable lawsuit when those records are made by persons with every possible temptation to misstatements."

Headnote 6, *Hoffman v. Palmer*, 129 F.2d 976, 977 (2d Cir. 1942); *Am.Dig.Sys.*, Evidence, Key No. 354(10).

POINT FIFTEEN
THE CIRCUIT COURT ERRS IN SUGGESTING THAT INDICIA OF RELIABILITY AS A TEST CAN DO AWAY WITH THE OTHER SPECIFIC TESTS OF RULE 803(10) AND THE SIXTH AMENDMENT

The Circuit Court in this case acts as if the sole test for admissibility of Exhibit of 1.10, in light of Rule 803(10) and the Sixth Amendment, is to find sufficient "indicia of reliability." (Slip Opinion, p. 11) Using that vague test, the Circuit Court ignores the specific statutory tests of Rule 803(10). That cannot be done. The "regularity" test must be applied. Those statutory tests cannot be ignored for some vague notion of "indicia of reliability."

The "indicia of reliability" test is really nothing more than the "lack of trustworthiness" test suggested in Rule 803(6), Rule 803(7) and 803(8) Federal Rules of Evidence. Such a test was intended to be a further shield against documents that already measured up under all the specified statutory tests. The "trust-

worthiness" or "reliability" test was never intended to be a separate independent test to be used to admit documents that did not measure up under the other specified statutory tests. Instead, it was intended to be a backup catchall protection to prevent otherwise admissible documents from being admitted.

The application of this test by the Circuit Court is conclusory, erroneous and misdirected. The Court implies that there is a "systematized data storage and retrieval" system for which there is no foundation in the record. (Slip Opinion, p. 11) The absence of a foundation for the admission of computer-derived information in this case should be a fact proving unreliability. The reference to some kind of a presumption of the trustworthiness of public records is ridiculous. Those records must measure up to the Federal Rules of Evidence and the constitution or they are not admissible.

This Circuit Court's approach to the Federal Rules of Evidence would destroy the meaning of the tests clearly set forth therein. It will create a dangerous precedent.

POINT SIXTEEN

ADMITTING INTO EVIDENCE EXHIBIT 1.10 VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (Sixth Amendment, United States Constitution).

". . . the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial" *Parker v. Gladden*, 385 U.S. 363 (1966) at p. 365; *In re Oliver*, 333 U.S. 257; *Pointer v. Texas*, 380 U.S. 400 (1965); *Kirby v. United States*, 174 U.S. 47.

> "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, supra, p. 404;

also see *Kirby v. United States*, supra, characterizing this right as "one of the fundamental guarantees of life and liberty," at p 56; *Gideon v. Wainwright*, 372 U.S. 335, 342; *Am.Dig.System*, Criminal Law, Key Number 662(1).

The purpose of the right of confrontation was to give the defense an opportunity to test recollection, sift the conscience of the witness, judge his demeanor, expose falsehood, bring out the truth and determine the worthiness for belief. *Mattox v. United States*, 156 U.S. 237, 242-243 (1895); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); see also 5 Wigmore, *Evidence*, Sections 1365 and 1397 (3d ed. 1940). The enormous worth of this right to confrontation is carefully described in the case of *California v. Green*, 399 U.S. 149 (1970) at page 158.

One of the undeniable methods for the utilization of the right to confrontation is cross-examination. Cross-

examination is a primary purpose of the right to confrontation. *Douglas v. Alabama,* supra, p. 418; *Bruton v. United States,* 391 U.S. 123 (1968), at p. 126; *California v. Green,* supra, p. 158 Cross-examination is "one of the safeguards essential to a fair trial". Mr. Justice Stone writing for the court in *Alford v. United States,* 282 U.S. 687, at p. 692; also see *In re Oliver,* 333 U.S. 257, at p. 273; *Pointer v. Texas,* supra, at pp. 404-405; *Dowdell v. United States,* 221 U.S. 325, at p. 330; *Motes v. United States,* 178 U.S. 458, at p. 474; *Kirby v. United States,* supra, pp. 55-56; *Mattox v. United States,* supra, pp. 242-243; *Hopt v. Utah,* 110 U.S. 574, at p. 581.

The courts have "been zealous to protect these rights from erosion" (speaking of confrontation rights, *Pointer v. Texas,* supra, 6. 405; *Greene v. McElroy,* 360 US. 474, at pp. 496-497.)

Exhibit 1.10 is in the nature of an affidavit. This was the very type of evidence the Sixth Amendment was intended to prevent.

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used . . . in lieu of personal examination and cross-examination of the witness . . ."

Mattox v. United States, supra, pp. 242-243; *Douglas v. Alabama,* supra, pp. 418-419; *Barber v. Page,* 390 U.S. 719 (1968), at p. 721, *Dec. Dig. System,* Criminal Law, Key Number 662 (1, 3).

Defendant, Neff, similar to the Defendant in the case of *Bruton v. United States*, supra, finds himself deprived of the opportunity for cross-examination concerning information which he himself was supposed to have supplied to the government agency previously. See *Bruton*, supra, p. 126.

Trial by affidavits violates the Sixth Amendment right. See *California v. Green*, supra, p. 156; *Reynolds v. United States*, 98 U.S. 145 (1879); *Mattox v. United States*, supra; *Motes v. United States*, supra; *Kirby v. United States*, supra. Particularly see the opinion by Justice Harlan concurring in *California v. Green*, supra, at 181 n. 15.

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination . . ."

Turner v. Louisiana, 379 U.S. 466, 472-473; *Pointer v. Texas*, supra, p. 405.

Even if the information used in exhibit 1.10 had been taken under oath, at a time when defense counsel were present and given limited cross-examination, even then such a document could not later be admitted into a case against the accused absent confrontation of the witness. *Pointer v. Texas*, supra, p. 402 and 407; *Barber v. Page*, supra, p. 721. If it could not be done under those conditions, how can it constitutionally be done in our case?

The use of a paper transcript or the like by the prosecution can be a fatal consideration. See the dictum in *Dutton v. Evans,* 400 U.S. 74 (1970) at p. 87 regarding "the use by the prosecution of a paper transcript." Also see *Pointer,* supra, *Brookhart v. Janis,* 384 U.S. 1; and *Barber v. Page,* supra.

It is not necsesary to prove a violation of the evidentiary "hearsay rule" to indicate a deprivation of the right to confrontation. ". . . no hearsay rule closely approximates the advantages of confrontation . . ." ("Confrontation and the Hearsay Rule," Note, 75 *Yale L.J.* 1434-1442 (1966), at p. 1437.)

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception."

California v. Green, supra, pp. 155-156; *Dutton v. Evans,* 400 U.S. 74 (1970) at pp. 81 and 86 n. 17. This should be kept firmly in mind as one considers the hearsay exception(s) suggested by the government in this case.

Constitutionalizing the hearsay rules would put

them beyond the reach of Congress. Justice Harlan, concurring in *California v. Green*, supra, p. 180 n. 14.

> ". . . the Constitution requires a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether . . . it is supported by 'salient and cogent reasons.'"

Dutton v. Evans, supra, p. 80.

Very few exceptions to the hearsay rule were in existence at the time of the ratification of the Constitution, and among those conspicuously absent was any exception such as F.R.E. Rule 803(6) for third persons. A third party clerk's entries could not be admitted unless the clerk was called to testify. See 5 Wigmore, *Evidence*, Sec. 1518(2)(b), p. 429.

> "The common law exception for business records required that the entries have been made by one with personal knowledge of the matter entered or upon reports to him by one with personal knowledge. If the entrant himself lacked personal knowledge, the foundation for the records required the testimony of all those giving information to their personal knowledge or proof of their unavailability."

McCormick, *Evidence*, Sec 310, p. 725

Do we have any testimony whatever of personal knowledge of the truth of the matters asserted in Exhibit 1.10? No, not one shred. Someone wrote it down somewhere, sometime, and we are to assume that one of them or all of them, how ever many there may be, had

personal knowledge. Even the Federal Rule of Evidence itself requires personal knowledge. F.R.E., Rule 803(6); McCormick, Sec. 310, p. 725. Suffice it to say, the common law of hearsay extant at the ratification of the Constitution and the Sixth Amendment required it.

There must be some substantial showing that the transmitter of the information on which the record is based must have had personal knowledge of the matter on which he expressed an opinion. *Weinstein's Evidence*, (1978), Vol. 4, p. 803-162. That is an elemental requirement that must be satisified even before one faces the more demanding requirements of the Sixth Amendment itself. "If the witness cannot vouch that the requirements of Rule 803(6) have been met, the entry must be excluded." *Weinstein's Evidence*, Sec. 803(6)(2), p. 803-13; *Halperin*, 441 F.2d 612 (5th Cir. 1971)

The Sixth Amendment, however, is bigger than any hearsay exception. Trivial compliance with a hearsay exception does not ensure a compliance with the great right of confrontation.

> "It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence by creating new and unlimited exceptions."

Harlan, concurring, *California v. Green*, supra, p. 179.

The Supreme Court has been very careful to scrutinize such "exceptions."

> "Some 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of 'reliability' and is incapable of being admitted, despite good faith effort of the state, in any way that will secure confrontation with the declarant. Such exceptions, dispensing altogether with the liberal right to 'confrontation' and cross-examination, have been subjected on several occasions to careful scrutiny by this Court."

California v. Green, supra, pp 161-162.

The use of affidavits instead of witnesses is, of course, an easier way to put people in prison. Which was probably why the colonial English governors used the technique against early Americans, and was the primary impetus to the creation of the Bill of Rights in the first place. The ease of such prosecutorial techniques has a tendency to lull prosecutors away from the Constitution and toward negligence.

> ". . . it may induce prosecutorial negligence in securing witnesses by holding out the easy alternative of presenting their statements through other witnesses. Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach."

"Confrontation and the Hearsay Rule," Note, 75 *Yale L. J.*, 1434 (1966), at p. 1439.

At the time of the ratification of the Sixth Amendment, proof by a certificate of the *lack* (absence) of a record *could not be admissible* under the common law.

"At common law, absence could not be established by the custodian's certificate of due search and inability to find."

". . . when there is a tension between the confrontation clause of the Sixth Amendment . . . and the literal language of the various hearsay exceptions it was the congressional intent that a less literal reading of the rules would be justified." "The hearsay exceptions of FRE 803 were only designed to prevent automatic exclusion on hearsay grounds . . .

not designed to insure admissibility of the questioned evidence."

Weinstein's Evidence, United States Rules, Par. 803(10)(01), p. 803-194; also see 5 Wigmore, *Evidence,* Sec. 1678 at 754 (3rd Ed. 1940).

United States v. Oates, 560 F.2d 45, 79 (2d. Cir. 1977) In our case, there is no tension between the rule and the Sixth Amendment because the clear wording of the rule itself forbids the admissibility of the exhibit. If there were such a tension, the Sixth Amendment demands greater protective treatment. *United States v. Oates, supra,* p. 66. This is in recognition of the separateness of the confrontation clause of the Sixth Amendment and the hearsay rule, which Sixth Amendment right "clearly extends beyond the confines of the hearsay rule." (Id.)

POINT SEVENTEEN

THE ADMISSION OF EXHIBIT 1.10 WAS CLEARLY PREJUDICIAL ERROR

Exhibit 1.10 was the only documentary exhibit that said that the accused had failed to file his tax returns for the years in question. (Transcript, p. 27)

The Circuit Court wrongly suggests that the actual 1040s for those years had the same evidentiary value. (Slip Opinion, p. 12) The Form 1040s said nothing at all about what did or did not constitute a failure to file a return. To the contrary, they were evidence that the accused had filed his tax returns.

The Circuit Court suggests that a jury could look at the Form 1040s and conclude, "within the meaning of the Internal Revenue Code," that they were not "proper tax returns." There is just as much logic in suggesting that an examination of those forms by the jury could lead to the conclusion that proper tax returns were filed. The real key to that issue, as has been pointed out before, lies in the validity of the Fifth Amendment claim taken on those forms.

In fact, however, the only evidence of a failure to file the tax returns, made in express form, was on the face of Exhibit 1.10. It said: "NO RECORD OF RETURN FILED." That is a legal opinion, as it must be a characterization of the returns which were actually filed. That legal opinion necessarily involves a determination by some unseen person somewhere that he did not believe that the Fifth Amendment claimed thereon was valid. For, if the Fifth Amendment were validly taken, there is no basis to say that the Form 1040s were not proper tax returns. It is, therefore, opinion evi-

dence. It is a legal opinion, and it is a complex constitutional legal opinion made by someone not subject to cross-examination.

This exhibit was used by the government to bypass the problem of proving the invalidity of Neff's Fifth Amendment claim. Convicting the accused is so much easier when it can be done by out of court statements, made by unidentified persons, through questionable computer systems, that make legal conclusions, which expressly supply the jury with a simple phrase that helps them to find one of the three major elements to be proved for a conviction.

Take away Exhibit 1.10, and the Prosecutor must use complex reasoning to try to show that the assertion of the Fifth Amendment on a tax return is the same thing as no tax return, "within the meaning of the Internal Revenue Code."

The admission of that exhibit was clearly prejudicial error.

REASONS FOR GRANTING THE WRIT

There are two major reasons for granting the writ:

1. To give the accused a chance to present his evidence on the validity of his Fifth Amendment claim. It is horribly unjust to sentence him to prison for two years for the crime of asserting the Fifth Amendment, when he was refused a chance to prove to a judge that his claim was valid.

2. The Circuit Court opinion in construing Rule 803(10) is going to cause great harm. The approach of the Circuit Court is to bypass the tests of that section altogether, rendering it meaningless. This Circuit Court decision introduces a blatant split of authority among the circuit courts, particularly against the Second Circuit and the well-reasoned line of cases stemming from *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977). This split of authority must be resolved. The Circuit Court introduced a sloppy "indicia of reliability" test that side steps the statute and opens the door to "trial by affidavit", condemned by a long line of Supreme Court decisions stretching back to *Mattox v. United States*, 156 U.S. 237 (1895).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Gary James Joslin
7742 Mountain Estates Drive
Salt Lake City, Utah 84121
Counsel for Petitioner

May 13, 1980

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 79-1286

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs

ROBERT NEFF,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and KENNEDY, Circuit Judges, and LARSON,* District Judge

WALLACE, Circuit Judge:

Neff appeals his conviction pursuant to 26 U.S.C. §7203 for willful failure to file income tax return. He claims that prosecution for the crime violated his Fifth Amendment privilege against self-incrimination and that the admission of certain evidence was erroneous because it was hearsay and because it denied his Sixth Amendment right to confrontation We reject his claims and affirm the conviction.

* Honorable Earl R. Larson, United States District Judge, District of Minnesota, sitting by designation.

I

During 1974 and 1975, Neff was employed as a police officer and received wages from the City of San Jose, California. During 1974 he also received capital gains from dealings in gold and silver coins. His community property share of income from employment and investments exceeded $14,000 in 1974 and $8,500 in 1975. During each of these years, Neff, who had previously filed proper returns, submitted to the IRS a standard individual income tax return form (form 1040) on which Neff provided no financial information from which his tax liabilities could be calculated. As returned by Neff, the forms contained only essential identification information and Neff's signature. In response to more than 25 questions about his financial and tax status, Neff had printed the words "Object: Self-Incrimination." Remaining questions had been answered either "None" or "Unknown." Neff also appended to the forms, in each of these years, over 100 pages of general protest material challenging, among other things, the national monetary system, government spending, and federal reserve notes.

The Internal Revenue Service (IRS) responded by letter to Neff, explaining that the forms as he filled them out were not acceptable tax returns and providing additional blank forms for proper completion. Neff refused to comply, claiming that by doing so he would waive his Fifth Amendment privilege against self-incrimination. The government filed an information charging Neff with two counts of willful failure to file

income tax returns, and a jury found him guilty of both counts.

We first consider Neff's claim of denial of the privilege against self-incrimination. We then examine the alleged hearsay evidence and denial of the right to confront adverse witnesses.

II

By asserting his Fifth Amendment privilege at the time he filed the 1040 forms, Neff complied with the well-established rule that a self-incrimination objection to an income tax return must be raised at the time of filing. *Garner v. United States*, 424 U.S. 648, 665 & n.21 (1976); *United States v. Raborn*, 575 F.2d 688, 689 (9th Cir. 1978). After the jury was impaneled, and just before opening statements were to begin, Neff moved for a pretrial ruling on the validity of his Fifth Amendment claim. This motion was denied as untimely.[1] Neff complains that he never thereafter received a judicial ruling on the validity of his asserted privilege. We disagree. An examination of the record shows that the district judge repeatedly expressed his conviction that Neff had no valid self-incrimination claim. In his instructions to the jury, the judge stated that Neff's belief to the contrary was "erroneous as a matter of law." Our responsibility on review is to determine the propriety of that ruling.

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[1] Neff does not contest before us the propriety of that denial. Moreover, the Supreme Court has said that such a pretrial ruling on a Fifth Amendment refusal to provide tax information is not constitutionally required. Garner v. United States, 424 U.S. 648, 664-65 (1976).

The Supreme Court has stated that the privilege against self-incrimination, if validly exercised, is an absolute defense to a section 7203 prosecution for failure to file an income tax return. *Garner v. United States, supra,* 424 U.S. at 662-63. The Court has also held, however, that the privilege does not justify an outright refusal to file any income tax return at all. *United States v. Sullivan,* 274 U.S. 259, 263 (1927). Furthermore, an objection may properly be raised only in response to specific questions asked in the return. *Id. See Garner v. United States,* 501 F.2d 228, 239 n.18 (9th Cir. 1974) (en banc), *aff'd Garner v. United States, supra,* 424 U.S. 648.

We are here faced with a case in which the taxpayer did assert his privilege in response to specific questions in the tax return form, but did so on such a wholesale basis as to deny the IRS any useful financial or tax information.[2] Other circuits, faced with similar wholesale assertions of the privilege against self-incrimination, have concluded that a tax return form which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning of the IRS laws. Once these courts determine that the taxpayer has filed no return, simple application of the *Sullivan* precedent, which states that the Fifth

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[2] In addition to refusing to disclose the total amount of his income, Neff even claimed the privilege in refusing to disclose his wife's social security number and the names of his dependent children Neither the Supreme Court nor this court has yet decided what specific tax return questions are so neutral (unlikely to incriminate) that the privilege could rarely, if ever, be asserted to justify a refusal to answer, **Garner v. United States, supra**, 424 U.S. at 650 n.3, and we do not find it necessary to make that determination in this case.

Amendment will never justify a complete failure to file a return, invalidates the Fifth Amendment defense. *Eg., United States v. Irwin*, 561 F.2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *United States v. Silkman*, 543 F.2d 1218, 1219-20 (8th Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 919 (1977); *United States v. Daly*, 481 F.2d 28, 30 (8th Cir.) (per curiam), *cert. denied*, 414 U.S. 1064 (1973).

Although we recognize the ease with which the logic used in these cases would resolve the issue before us, we conclude that such reliance upon the definition of a tax return is inappropriate, because it lacks independent Fifth Amendment analysis. Moreover, the usefulness of this definitional approach is too limited because it is confined to facts such as those presented here: the wholesale assertion, albeit in response to specific questions, of the privilege against self-incrimination. In settings in which the Fifth Amendment right has been more discretely asserted, it would be difficult to conclude that no return has been filed, and, therefore, inappropriate to apply this definitional analysis.[3] We therefore choose not to follow the lead of the cited cases. We believe that the better approach to this and future Fifth Amendment tax return cases is to apply more traditional Fifth Amendment analysis.[4]

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[3] Moreover, we are not certain that these circuit court decisions comport with Supreme Court precedent. The cases indicate that the taxpayer may never assert his privilege against self-incrimination in lieu of tax form responses essential to the calculation of tax liability. This rule, which limits the tax form questions to which a Fifth Amendment response is proper to those questions not essential to tax liability calculation, necessarily limits — perhaps too much — the scope of the Supreme Court's declaration in Garner that the Fifth Amendment may be asserted on a tax return. 424 U.S. at 662.

The requirement that citizens file a yearly income tax return does not, of itself, violate their privilege against self-incrimination. This conclusion is implicit in the Supreme Court ruling that taxpayers cannot rely upon the Fifth Amendment to justify a complete failure to file. *See Sullivan v. United States, supra,* 274 U.S. at 263. Other statutory reporting requirements have been found to violate the privilege, but the reporting schemes in these cases were "directed at a highly selective group inherently suspect of criminal activities . . . in an area permeated with criminal statutes . . . ." *Albertson v. SACB*, 382 U.S. 70, 79 (1965). Questions on income tax returns, in contrast, are "neutral on their face and directed at the public at large. . . ." *Id. See also California v. Byers*, 402 U.S. 424, 429 (1971); *Marchetti v. United States*, 390 U.S. 39, 57 (1968); *Grosso v. United States*, 390 U.S. 62, 64 (1968). Therefore, in order for Neff to escape prosecution under section 7203, there must be something peculiarly incriminating about his circumstances that justifies his reliance on the Fifth Amendment. Before examining that circumstance, we will set forth pertinent Fifth Amendment principles.

To claim the privilege validly a defendant must be faced with " 'substantial hazards of self incrimination,' " *California v. Byers, supra,* 402 U.S. at 429, that are

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[4] This is not to say that we reject the previous decision by this court that tax return forms devoid of financial information are not tax returns within the meaning of 26 U.S.C. § 7203. United States v. Klee, 494 F.2d 394, 397 (9th Cir. 1974). Such precedent has value in determining when section 7203 has been violated. We simply conclude that it does not have value as a means to determine the validity of Neff's assertion of the privilege against self-incrimination.

"'real and appreciable' and not merely 'imaginary and unsubstantial.'" *Marchetti v. United States, supra,* 390 U.S. at 48, *quoting in part Rogers v .United States,* 340 U.S. 367, 374-75 (1951). Moreover, he must have "reasonable cause to apprehend [such] danger from a direct answer" to questions posed to him. *Hoffman v. United States,* 341 U.S. 479, 486 (1951). The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id. See also Hashagen v. United States,* 283 F.2d 345, 348 (9th Cir. 1960). Indeed, it is enough if the responses would merely "provide a lead or clue" to evidence having a tendency to incriminate. *Id.* at 348.

In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the "implications of the question[s] in the setting in which [they are] asked . . . ." *Hoffman v. United States, supra,* 341 U.S. at 486; *United States v. Pierce,* 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978); *Hashagen v. United States, supra,* 283 F.2d at 350. He "'[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" *Hoffman v. United States, supra,* 341 U.S. at 487, *quoting Ex Parte Irvine,* 74 F. 954, 960 (C.C. Ohio, 1896); *United States v. Pierce, supra,* 561 F.2d at 741. If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no

threat of self-incrimination exists, it then becomes incumbent "upon the defendant to show that answers to [the questions] might criminate him." *United States v. Weisman*, 111 F.2d 260, 261 (2d Cir. 1940). *See also Garner v. United States, supra*, 424 U.S. at 658 n. 11; *United States v. Daly, supra*, 481 F.2d at 30; *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 628 (3d Cir. 1967); *Hashagen v. United States, supra*, 283 F.2d at 350. This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him " 'to prove guilt to avoid admitting it.' " *Marchetti v. United States, supra*, 390 U.S. at 50, *quoting United States v. Kahriger*, 345 U.S. 22, 34 (1953) (Jackson, J., concurring). But neither does the law permit the defendant to be the final arbiter of his own assertion's validity. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to decide whether his silence is justified . . . ." *Hoffman v. United States, supra*, 341 U.S. at 486. *See also Marchetti v. United States, supra*, 390 U.S. at 50; *Albertson v. SACB, supra*, 382 U.S. at 79; *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978); *United States v. Daly, supra*, 481 F.2d at 30; *Hashagen v. United States, supra*, 283 F.2d at 348.

Thus, the defendant is placed in a delicate position, well described by Judge Learned Hand:

> Obviously a witness may not be compelled to do more than show that the answer is likely to be

> dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

United States v. Weisman, supra, 111 F.2d at 262.

Applying these principles to the facts before us, we conclude that the trial judge correctly decided that Neff had no valid Fifth Amendment defense to the section 7203 prosecution. The questions asked of Neff on the income tax form did not, of themselves, suggest that the response would be incriminating; nor did the setting in which they were asked — a general inquiry about Neff's financial and tax status, to be completed in the privacy of his own home — alter the non-incriminatory nature of those questions. Moreover, the peculiarities of the case did not strengthen Neff's claim. If anything, the tax protest nature of defense witness Holmes' testimony and of the materials that Neff appended to his returns suggest that Neff's refusal to complete the forms was motivated by a desire to protest taxes, rather than a fear of self-incrimination. In short, the whole circumstance was "innocuous and thus unprotected absent some positive disclosure by the witness of its hidden dangers . . . ." *Hashagen v. United States, supra,* 283 F.2d at 350. Neff made no such disclosure. At no point during the trial, including when Neff

testified, was the district judge presented with any indicia of potential incrimination.[5] On the contrary, Neff's counsel argued that Neff's sincerity of belief was sufficient to validate his assertion of the privilege, and that Neff alone should be the final arbiter of the assertion's validity.[6] As we have seen, that is not the law. Neff did not show that his response to tax form questions would have been self-incriminating. He cannot, therefore, prevail on his Fifth Amendment claim.

III

During trial, the government introduced into evidence an IRS Certificate of Assessments and Payments which stated that Neff had filed no proper tax returns during 1974 and 1975. Neff complains that such evidence was inadmissible hearsay and that its admission violated his Sixth Amendment confrontation right.

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[5] That Neff never received a pre-trial evidentiary hearing on his Fifth Amendment claim does not mean that he was deprived of the opportunity to establish its validity. It is clear from the record that Neff's attorney attempted to validate the assertion of the privilege by questioning Neff about his reasons for asserting it and his sincerity in doing so. When the district judge instructed Neff's attorney that Neff could diclose as much or as little of the criminal conduct as he wished, the attorney asked Neff no questions about the underlying reason for his fear of incrimination.

[6] Counsel for Neff stated in his closing argument:

> There's only one test that's important, whether or not Mr. Neff, in good faith, believed that he might be incriminated if he gave information . . . . If you find that his belief was erroneously held, but was held in good faith, then he had a right to use it, even if it's erroneous, as long as he's sincere. That has to be the test in this country, otherwise every man, when he asserted his right to privacy, would be subject to some other person's test for whether or not he was really a criminal. . . . He may raise the objection in the [tax] return and if he believed it in good faith, it was right. And that's the whole issue.

We have said:

> Although the right of confrontation and the hearsay rule protect similar interests of a defendant, they do not have identical applications. Evidence may be admissible under an exception to the hearsay rule and still violate the Confrontation Clause. Or, it may not violate the Confrontation Clause, but still be inadmissible hearsay.

United States v. Lee, 589 F.2d 980, 987 (9th Cir. 1979). We will discuss the hearsay and Confrontation Clause issues separately.

A.

Rule 27 of the Federal Rules of Criminal Procedure states that "[a]n official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." Rule 803(10) of the Federal Rules of Evidence specifically permits the admission of negative records:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

The document in question was admitted to prove the "nonoccurrence" of Neff's 1974 and 1975 tax returns, was "made and preserved" by the IRS, "a public office or agency," and was "evidence in the form of a certification in accordance with rule 902," specifically Rule 902 (4) and (1). Neff contends that the prosecution failed to show that a "diligent search" had been made in connection with the production of the document as required by Rule 803(10), and that the document was, therefore, not admissible under that exception to the hearsay rule. The custodian of IRS records testified, however, that in producing the document he "researched the National Computer Center in Martinsberg, West Virginia, where all tax information is merged for every individual in the nation." Mere failure to include the word "diligent" is not sufficient to defeat the applicability of Rule 803 (10). *United States v. Lee, supra,* 589 F.2d at 987 n.7. *Accord, United States v. Farris,* 517 F.2d 226, 228 (7th Cir.), *cert. denied,* 423 U.S. 892 (1975); *United States v. Dota,* 482 F.2d 1005, 1007 (10th Cir.), *cert. denied,* 414 U.S. 1071 (1973). We hold that the IRS Certificate of Assessment and Payments was admissible under the Rule 803(10) exception to the hearsay rule.

B.

In order to rule that Neff's Sixth Amendment right to confront adverse witnesses was not violated by admission of the IRS document we must be convinced that the document was reliable, for "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in

criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans,* 400 U.S. 74, 89 (1970), *quoting California v. Green,* 399 U.S. 149, 161 (1970). In examining the document and the circumstances under which it was admitted into evidence, we find sufficient "indicia of reliability," *Dutton v. Evans, supra,* 400 U.S. at 89, to convince us that it was not error to place the document before the jury.

> The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). The document in question here was the product of systematized data storage and retrieval by a public agency charged with the responsibility of maintaining accurate financial and tax information. Its admission into evidence involved no risk of faulty human recollection and little likelihood of misrepresentation of significant data. Clearly, the public record indicating that Neff failed to file proper tax returns in 1974 and 1975 was not the inherently unreliable out-of-court statement at which the Confrontation Clause was directed. "The

rationale which underlies all of the public document exceptions to the hearsay rules is that statements made by public officials in the discharge of their duties are generally trustworthy." *United States v. Lee, supra,* 589 F.2d at 988.

We, along with a clear majority of those courts which have weighed the admission of negative public records against a Sixth Amendment challenge, have concluded that admitting such documents does not violate the defendant's right to confrontation. *United States v. Lee, supra,* 589 F.2d at 988-89. *E.g., United States v. Downing,* 454 F.2d 373, 376 (10th Cir. 1972); *Warren v. United States,* 447 F.2d 259, 262 (9th Cir. 1971); *United States v. Mix,* 446 F.2d 615, 622-23 (5th Cir. 1971); *United States v. Thompson,* 420 F.2d 536, 545 (3d Cir. 1970).[7]

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[7] Neff urges us to rely upon **United States v. Oates,** 560 F.2d 45 (2d Cir. 1977), and thus hold that admission of the IRS document violated his right to confrontation and was inadmissible hearsay because it was a public report offered by the government in a criminal trial contrary to the implication of Federal Rule of Evidence 803(8). We decline to do so. The IRS document offered into evidence against Neff is distinguishable from the "evaluative reports" considered in **Oates. Id.** at 67 n.19, 68, 69. There, the evidentiary report chronicled the chemical analysis of a substance, eventually identified in the report as heroin. The chemist who performed the analysis was not present at trial to testify about the chemical procedures used in making the identification, or about the reasons for his conclusion that the substance was heroin. Other examples of "evaluative reports" referred to in the opinion are psychiatric and psychological examination, and documents reporting the testing of grain. **Id.** at 67 n.19. It appears to us self-evident that the national records of IRS receipts reported by a custodian of those records are inherently less needful of probing cross-examination than are conclusions reached through scientific examination by an out-of-court analyst.

Moreover, the nonexistence of Neff's 1974 and 1975 tax returns was well established by other evidence at trial. The actual 1040 Income Tax Return Forms which Neff completed and filed were introduced into evidence. Those returns, which contained no information from which tax liability could be calculated, themselves demonstrated that Neff filed no proper tax returns during 1974 and 1975 "'within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.'" *United States v. Klee*, 494 F.2d 394, 397 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974),[8] *quoting United States v. Porth*, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970).

We conclude that Neff has no valid hearsay evidence or Confrontation Clause challenge to his conviction.

AFFIRMED.

Petitioner's Note:

1. The Circuit Court says that the returns "contained no information from which tax liability could be calculated." That is absolutely false! Neff indicated the amount of his withholding and incorporated by reference his W-2 forms on the very face of his tax returns. Any accountant could calculate tax liability from that information.

2. Only information regarding "income" can possibly be required under the law. The Circuit Court's

[8] See note 4, supra.

phrase "wholesale assertion" of the Fifth Amendment is misguided. No judge could rationally claim that citizens can be imprisoned for a failure to report "deductions" or "credits." If that were the case, everyone in America would be criminals.

CERTIFICATE OF SERVICE

Gary James Joslin, Attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, does hereby certify that two copies of the foregoing Petition were served upon the office of the United States Attorney to the attention of Nancy Simpson, Assistant United States Atorney, P.O. Box 36055, 450 Golden Gate Avenue, San Francisco, California 94102, by mailing the same, postage prepaid on or about the 14th day of May, 1980, all in accordance with the Rules of this Court.

Gary James Joslin

Attorney at Law